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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

MICHAEL EMERSON CORRELL,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

In 2001, pursuant to a remand to address a claim of ineffective assistance of counsel, the district court held a 9-day evidentiary hearing during which it heard testimony from 17 witnesses, 14 of whom were called by Correll, and reviewed voluminous documents. In a detailed 109-page decision issued in 2003, the district court found that Correll was not prejudiced due to any deficient performance on counsel's part.

The Ninth Circuit reversed the decision in 2008, notwithstanding the district court's careful findings. As the dissenting judges noted,

> [t]he panel majority's opinion reweighs the evidence before the district court and reverses its conclusion by ignoring the district court's factual findings as well as the second prong of the *Strickland* test for ineffective assistance of counsel. The majority opinion collapses the two *Strickland* prongs into one prong. The opinion implies that if counsel makes a strategic decision not to investigate or present what it calls "classic mitigating circumstances" that would nonetheless open the door to more damaging aggravating evidence, prejudice will be presumed. . . .

Correll v. Ryan (*Correll V*), ___ F.3d ___, 2008 WL 2039074 (9th Cir. 2008) (Pet. App. A at 3) (Callahan, J., dissenting from denial of rehearing en banc).

1. Did the Ninth Circuit fail to appropriately afford deference to the district court's factual findings?

2. Did the Ninth Circuit essentially eliminate the prejudice prong of the *Strickland* analysis by presuming prejudice, and by failing to consider the facts and circumstances of the offense, the death-qualifying aggravating factors found at trial, Arizona law, and the rebuttal evidence the state would have presented had the alleged omitted mitigation been offered?

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OPINION BELOW

A panel of the United States Court of Appeals for the Ninth Circuit (Judges Thomas and Schroeder) held, in an amended opinion, that Correll is entitled to be resentenced based upon trial counsel's alleged deficient performance and resulting prejudice. Judge O'Scannlain dissented. *Correll v. Ryan* (*Correll V*), ___ F.3d ___, 2008 WL 2039074 (9th Cir. 2008) (Pet. App. A). The panel opinion reversed a decision by the United States District Court for the District of Arizona. *Correll v. Ryan* (*Correll IV*), CV 87–1471–PHX–SMM (Pet. App. B). *See also Correll v. Ryan* (*Correll III*), 465 F.3d 1006 (9th Cir. 2006); *Correll v. Stewart* (*Correll II*), 137 F.3d 1404 (9th Cir. 1998); *State v. Correll* (*Correll I*), 715 P.2d 721 (Ariz. 1986).

STATEMENT OF JURISDICTION

On May 14, 2008, the Ninth Circuit denied Petitioner's petition for rehearing en banc. Chief Judge Kozinski, and Judges Callahan, O'Scannlain, Kleinfeld, Tallman, Bea dissented. (*Correll V*, Pet. App. A). This petition for writ of certiorari is timely filed within 90 days of that decision, and this Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of Counsel for his defence.

STATEMENT OF THE CASE

Following a jury trial, Correll was convicted of three counts of first-degree murder, four counts of kidnapping, one count of armed robbery, and one count of first-degree burglary, in connection with the 1984 execution-style murders of Robin Cady and Shawn D'Brito, the strangulation death of Debra Rosen, and the attempted murder of Guy Snelling.

The trial court found the existence of four aggravating, death-qualifying circumstances: (1) Correll had previously been convicted of a violent felony; (2) the offenses had been committed in expectation of pecuniary gain; (3) the murders were committed in an especially cruel, heinous or depraved manner; and (4) the offenses constituted a series of multiple homicides.[1] The trial court concluded that the mitigation evidence was insufficient to call for leniency, and sentenced Correll to death on the murder counts, and to terms of imprisonment on the remaining counts.

On direct appeal, the Arizona Supreme Court found that the record did not support a finding that Correll intended to kill victim Debra Rosen, and modified Correll's sentence for Rosen's murder from death to life imprisonment. *Correll I,* 715 P.2d. at 730–31. With regard to the two other murder convictions, the court

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[1] Correll's case was final before the Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), in which the Court held that the Sixth Amendment requires, in most cases, jurors to find at least one death-qualifying aggravating factor.

affirmed the existence of three of the aggravating factors found by the trial court, but denied the multiple homicides aggravator, finding that the aggravator became effective after the crimes were committed, but before Correll was sentenced. *Id.* at 734–35. After conducting both an independent review of the aggravating and mitigating circumstances, as well as a proportionality review, the court affirmed Correll's death sentences with respect to the murders of Robin Cady and Shawn D'Brito. *Id.* at 731–38.

In 1987, Correll filed a petition for post-conviction relief, asserting multiple violations of his constitutional rights, including his right to effective assistance of counsel during the guilt and penalty phases of trial. *See Correll III*, 465 F.3d at 1009. The trial court summarily denied his petition, and the Arizona Supreme Court summarily denied review. *Id.*

Correll then filed a petition for writ of habeas corpus in the United States District Court for the District of Arizona, raising 53 claims of constitutional violations at trial, sentencing, and direct appeal.[2] *Id.* The district court found 26 of Correll's claims were procedurally barred, and granted summary judgment against him on the remaining counts. *Id.*

In 1998, a panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, except for Correll's contention that he was entitled to an evidentiary hearing on his claim of

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[2] Correll filed his petition prior to the effective date of the AEDPA. (*See Correll V*, Pet. App. A, A-25).

ineffective assistance of counsel at the sentencing phase of trial. The panel remanded the matter to the district court with instructions to hold an evidentiary hearing on the claim. *Id.*

On remand, the district court conducted a 9-day evidentiary hearing in 2001, and found that Correll had failed to prove that he was prejudiced from any deficient performance on the part of sentencing counsel. (*See Correll IV*, Pet. App. B).

In 2006, a panel of the Ninth Circuit held, in a 2–1 decision, that Correll was entitled to be re-sentenced based on trial counsel's alleged deficient performance and resulting prejudice, reversing the district court. *See Correll III.* Petitioners subsequently filed a petition for rehearing en banc, which was denied 19 months later by a majority of the non-recused active judges of the Ninth Circuit. Six Circuit Court judges dissented from the denial of rehearing. (*See Correll V*, Pet. App. A).

Concomitantly with the filing of the denial of Petitioners' petition for rehearing en banc, the original panel elected to file an amended opinion, in which Judges Thomas and Schroeder once again held, over Judge O'Scannlain's amended dissent, that Correll was entitled to be resentenced. *Id.*

SUMMARY OF ARGUMENTS

1. The Ninth Circuit failed to appropriately defer to the district court's factual findings. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984) ("district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)"). This deference requirement is especially compelling in cases involving claims of ineffective assistance of counsel, in which a court must, in conducting its prejudice analysis, necessarily assess the strength and reliability of the proffered evidence, a function best undertaken by the court which presided over the hearing at which the evidence was presented.

2. The Ninth Circuit essentially eliminated the prejudice prong of the *Strickland* analysis. The panel's erroneous legal holding, that *Wiggins v. Smith*, 539 U.S. 510 (2003) created a presumption of prejudice with respect to certain types of omitted mitigation, is contrary to the jurisprudence of this Court. The panel's failure to consider the facts and circumstances of the offense, the death-qualifying aggravating circumstances, the rebuttal evidence that the state would have presented had the additional allegedly mitigating evidence been offered, and Arizona law, is contrary to this Court's Sixth Amendment jurisprudence with respect to the right to effective assistance of counsel.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

THE NINTH CIRCUIT FAILED TO DEFER TO THE DISTRICT COURT'S FACTUAL FINDINGS.

Pursuant to the Ninth Circuit's 1998 remand, the district court held a 9-day evidentiary hearing in 2001, during which it heard testimony from 17 witnesses and reviewed voluminous documents. In a detailed 109-page decision issued in 2003, the district court found that trial counsel's performance had been deficient regarding only two matters. First, the district court held:

> [T]he Court reluctantly and narrowly concludes that [counsel's] performance was deficient because he failed to review Petitioner's mental health records . . . before making sentencing strategy decisions.

(*Correll IV*, Pet. App. B at 25). Second, the district court "narrowly conclude[d]" that counsel should have obtained the medical treatment records concerning the head injury Correll suffered when he was seven years old. (*Id.* at 29).

The district court rejected Correll's other challenges to counsel's performance,[3] including his contention that counsel had improperly failed to present mitigating

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[3] (*See Correll IV*, Pet. App. B at 15–17, 40–46).

evidence concerning Correll's use of illegal drugs. (*Id.* at 30–40).

Addressing the prejudice prong of the *Strickland* analysis, the district court held that Correll was not prejudiced by counsel's failure to review his mental health records, because Correll's proffered mental health evidence was "not entitled to significant mitigating weight"—there was "no credible evidence that [Correll's] personality disorder or his mild depression impaired his capacity or significantly influenced his behavior at the time he committed the crimes." (*Id.* at 60), citation to the record omitted). The district court further found that any potential prejudice was also "eclipsed by the overwhelming rebuttal evidence of specific bad acts of an aggravating nature." (*Id.* at 60–61). The district court similarly concluded that Correll was not prejudiced by counsel's failure to obtain his medical records because, based upon the evidence presented, Correll "did not suffer any brain injury from the block wall that fell on him when he was 7 years old." (*Id.* at 63).

The district court's conclusions are entitled to deference:

> Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

Federal Rules of Civil Procedure Rule 52(a)(6). *See also Strickland*, 466 U.S. at 698 ("district court findings are

subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)"). Under the "clearly erroneous" standard set out in Rule 52(a)(6), "[a]n appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.'" *Inwood Laboratorites, Inc. v. Ives laboratories, Inc.*, 456 U.S. 844, 857–58 (1982) (quoting *United States v. Real Estate Boards*, 339 U.S. 485, 495 (1950)).

To determine whether a petitioner "has met [this] burden of showing that the decision reached would reasonably likely have been different absent the errors," *id.* at 696, a court addressing a claim of ineffective assistance of counsel must necessarily assess the strength and reliability of the proffered evidence, a function best undertaken by the court which presided over the hearing at which the evidence was presented. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574–575 (1985).

The panel majority ignored this fundamental rule. In his amended dissent to the panel's opinion, Judge O'Scannlain notes the "sharp divergence between the majority's presentation of the facts and the district court's factual findings." (*Correll V,* Pet. App. A at 51 n.1)). Similarly, in her dissent to the denial of rehearing en banc, Judge Callahan concludes:

> Here, the district court held a nine-day evidentiary hearing and made detailed findings of fact on remand from this court. We abuse our

> role as an appellate court when we cavalierly ignore the findings that a district court makes on remand. . . . The majority, in pursuing "some mitigating evidence [that] could have spared Correll's life," fails to appreciate—as it is required to—that the district court's contrary position is reasonable and entitled to deference.

(*Id.* at 14–15).

The dissenters' criticism is apt—the panel's improper substitution of its independent interpretation of the evidence heard by the district court is demonstrated numerous times throughout its decision. For example, to support its finding that Correll was prejudiced due to counsel's failure to investigate and present evidence concerning his childhood head injury, the panel states:

> When Correll was seven, a brick wall collapsed on his head. Although he was unconscious for some time after the accident, his parents did not seek medical treatment until several days later when he was still not back to normal. Several experts testified that this type of accident and the symptoms Correll exhibited then and now indicate a high likelihood of brain impairment.

(*Correll V*, Pet. App. A at 43, footnote omitted). This independent assessment of the evidence concerning Correll's injury differs significantly from the district court's detailed factual findings:

[P]etitioner received a head injury on April 8, 1967, when he was 7, at which time his parents took him to see their family doctor. Four days later, Petitioner was vomiting and again taken to the family doctor where an X-ray was taken and an EEG scheduled. On April 14, 1967, an EEG was done. On April 15, in response to more vomiting, Petitioner's parents took him to the emergency room at Children's Hospital of Los Angeles. At the hospital, he was seen by a treating physician, who diagnosed a subgaleal hematoma, which is a bruise or collection of blood under the scalp, but above the skull. The treating physician recommended a neurosurgery consultation, which was done. The doctor in the neurosurgery clinic also diagnosed Petitioner with a subgaleal hematoma. On May 3, 1967, Petitioner was brought back to the neurosurgery clinic for a follow-up visit. The follow-up visit noted that Petitioner's hematoma cleared in 5 days and that Petitioner was alert and well.

. . .

Dr. Anne Herring, Petitioner's neuropsychologist, performed neuro-psychological testing upon Petitioner to assess his cognitive functioning and whether he has any brain injury. For the vast majority of tests (30 out of 33 tests), Petitioner's scores were average to high average. Dr. Herring identified 3 tests where Petitioner had difficulty. Dr. Herring opined that Petitioner had severe difficulty on one test measuring his central information

processing capacity. Based on her testing, Dr. Herring testified that Petitioner's performance suggests some degree of brain dysfunction and problems with impulse control. Dr. Herring further opined that Petitioner's history of dysfunctional behavior suggests a possibility of prefrontal lobe brain impairment. Finally, she noted that his dysfunctional behavior is exacerbated by the ingestion of recreational drugs and alcohol.

Respondents presented a report and testimony from Dr. Daniel Martell, a neuropsychologist. Dr. Martell tested petitioner after Dr. Herring and had the benefit of her report. Dr. Martell focused his testing on assessing areas of possible impairment, Petitioner's visual perceptual skills, his visual memory and executive functioning. Dr. Martell concluded that there is evidence that Petitioner has isolated neuropsychological impairments or deficits characterized by mild impulsivity and difficulty with selective attention. However, those isolated impairments did not generalize to Petitioner's overall ability to organize, plan and control his behavior. Regarding his frontal lobe ability, Dr. Martell testified that there is significant variability. In some areas he [Correll] is "absolutely genius" and in others average to above average, and in still another there is mild to moderate deficit. Overall, Dr. Martell characterized Petitioner as only having very mild impairment and that of all the capital defendants he has tested, Petitioner is one of the

> highest functioning defendants. The Court requested clarification, and asked how it should view a finding of mildly brain impaired. Martell opined that "*it's a very minor finding.*"

(*Correll IV*, Pet. App. B at 61–63), emphasis added, citations to the record omitted). From this factual record, the district court concluded:

> Based on testimony received from neuropsychologists, the Court concludes that Petitioner did not suffer any brain injury from the block wall that fell on him when he was 7 years old. The Court specifically finds that Petitioner does suffer from some mild brain impairment or deficit. The Court adopts Dr. Martell's finding that it is a minor impairment and does not generalize to Petitioner's overall ability to organize, plan and control his behavior. The Court further adopts the finding of Dr. Martell that, when subjected to neuropsychological testing, most everyone suffers some level of deficit or impairment. The Court is unable to determine the origin of Petitioner's mild impairment. Petitioner did not demonstrate any brain damage or that his mild brain deficit or impairment was a factor in the murders.

(*Id.* at 63, citations to the record omitted).

The panel majority attempts to justify its questionable independent interpretation of the evidence by asserting:

> [I]n the procedural context of this case, the district court's role was not to evaluate the evidence in order to reach a conclusive opinion as to Correll's brain injury (or lack thereof). The district court should have decided only whether there existed a "reasonable probability" that "an objective fact-finder" in a state sentencing hearing would have concluded, based on the evidence presented, that Correll had a brain injury that impaired his judgment at the time of the crimes.

(*Correll V*, Pet. App. A at 43 n.6, citation omitted.)

This explanation for the panel's disregard of the district court's factual findings is not persuasive. Obviously implicit in the district court's findings is a determination that there was no reasonable probability that "'an objective fact-finder' in a state sentencing hearing" would have found "that Correll had a brain injury that impaired his judgment at the time of the crimes."

The panel's improper disregard of the district court's factual findings is further demonstrated by its independent analysis of the evidence regarding Correll's use of methamphetamine:

> Perhaps more compellingly, the evidence of Correll's methamphetamine use on the night of the crimes, had it been fully presented, could have risen to the level of a statutory mitigator. Under Arizona law, gross intoxication at the time of the crime constitutes a statutory mitigator if that intoxication impaired the

> defendant's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." A.R.S. § 13-703(G)(1). There was undisputed evidence adduced at the evidentiary hearing that Correll was addicted to methamphetamine, that Correll used some methamphetamine on the day of the crime, that Correll habitually used methamphetamine in astonishingly and unusually high dosages, and that drug addicts generally are incapable of using their drug of choice in any dosage that is lower than their usual dosage. Thus, the evidence strongly indicated that Correll used an extremely high dosage of methamphetamine on the day of the crime.

(*Correll V*, Pet. App. A at 46–47).

The panel's view of the evidence, which ignores the fact that Correll did not testify at the evidentiary hearing and refused to cooperate with the State's drug abuse expert, is in marked contrast to that of the district court which, after hearing the evidence first hand, found that Correll had failed to prove that he was intoxicated when the victims were murdered, specifically noting:

> Absent other evidence in support or proof by Petitioner, the Court will not assume that Petitioner was intoxicated when the crimes were committed. Rather, the evidence shows that it was Petitioner who remained calm when the gun misfired as Nabors was trying to kill Robin

> Cady. It was Petitioner who encouraged Nabors to remain calm as there were no cars coming, to get a shell chambered and shoot Cady. Such behavior at the time of the crime does not demonstrate intoxication and, in fact, undercuts an assertion of intoxication.

(*Correll IV*, Pet. App. B at 69, internal citation omitted).

The panel attempts to explain its refusal to defer to these factual findings of the district court by asserting that the district court's conclusion, that Correll was not intoxicated when the victims were murdered, was based upon "a critical misunderstanding" of the evidence:

> At the evidentiary hearing, expert testimony made it clear that gross methamphetamine intoxication, unlike gross alcohol intoxication, is not necessarily apparent to outside observers. The experts described a state known as "methamphetamine blackout," during which the user would be capable of performing complex tasks but would be incapable of understanding or remembering his behavior. One of the experts, a recovered methamphetamine addict, specifically confirmed the possibility that "those observing a person in a methamphetamine blackout [wouldn't] know that the person is in a methamphetamine blackout." This evidence severely undermines the propriety of the district court's reliance on witness observation in concluding that Correll was not intoxicated on

> the night of the crimes. Those witnesses might not have known whether Correll was intoxicated or not.

(*Correll V*, Pet. App. A at 47).

However, the panel ignores the fact that no credible evidence was presented at the hearing to corroborate Correll's self-serving claim that he was under the influence of methamphetamine when the victims were murdered. As the district court found:

> The Court does not credit [Correll's] unsubstantiated self-report that he abused methamphetamine every day before the crimes were committed. Petitioner chose not to testify at the evidentiary hearing; Petitioner chose not to fully cooperate with [the government's drug abuse expert's] examination of him regarding the issue of drug abuse. Because of the obvious motive to fabricate, Petitioner's self-serving statements about his drug usage prior to the crimes is [sic] unreliable and subject to searching skepticism. *See, e.g.*, [*State v.*] *Medrano,* 914 P.2d [192,] 227 [(Ariz.1996)] ("the defendant provided most of the information concerning his use of cocaine in the past and on the night of the murder, as well as the drug's effect on him. Because of the obvious motive to fabricate, such self-serving testimony is subject to skepticism and may be deemed insufficient to establish mitigation.")]; *see also Bernard Smith* [*v. Stewart*], 140 F.3d 1263,] 1270 [(Ariz. 1998)] (evaluating evidence based on impartial

sentencing judge applying Arizona law); *see generally, Strickland,* 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). The Court's searching skepticism toward Petitioner's self report is corroborated by Respondent's drug abuse expert, Dr. Matthews, who opined as follows: "Antisocial personality disorder is characterized by malingering and deceit; instances of [Petitioner's] lifelong pattern of deceptiveness abound throughout his penal and other records. He has been deceitful about a great many matters, including his history of substance abuse. Because of [Petitioner's] history of deceit, it is a major clinical error to accept [Petitioner's] self-serving view of his condition at the time of the offense as accurate."

Based on [counsel's] testimony, it appears that Petitioner may have abused some unknown amount of methamphetamine on the days prior to April 11, 1984. However, at the evidentiary hearing, Petitioner did not prove such usage.

For the day before the crimes, the Court credits Robin Correll's testimony that she witnessed Petitioner inject himself with methamphetamine in the morning. However, her failure to testify at sentencing was not prejudicial to Petitioner as [counsel] could not have had Robin testify due to the inculpatory information she had regarding his whereabouts

> at the time of the crime.[4] The Court finds that there was no other evidence presented that Petitioner was intoxicated or under the influence of methamphetamine the day before the crimes were committed. Absent other evidence in support or proof by Petitioner, the Court will not assume that Petitioner was intoxicated when the crimes were committed. . .

(*Correll IV*, Pet. App. B at 67–69), internal citations omitted).

Another example of the panel's refusal to defer to the district court's factual findings concerns Correll's psychological history. The panel states:

> Correll was committed to psychiatric institutions at least twice during his teen years and was described at age 16 as "severely psychologically impaired." He was treated with a tranquilizer/anti-psychotic drug while institutionalized, and he attempted suicide on two occasions. However, there is no evidence that Correll continued to receive treatment after these stays.

(*Correll V*, Pet. App. A at 44–45).

The panel's summary of Correll's psychological history is once again at odds with the district court's

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[4] (*See Correll IV*, Pet. App. B at (40); *see also* discussion *infra*).

assessment of the evidence it heard. Based upon that evidence, the district court found that, although Correll "established a history of mental health commitments to psychological facilities when he was a minor," there was "insufficient evidence to support that Petitioner has ever suffered from any major mental illness, whether PTSD [post traumatic stress disorder], a major depressive disorder, or a bipolar disorder." (*Correll IV*, Pet. App. B at 58–59). The district court reached this conclusion after two psychological experts testified that there was no evidence Correll has ever suffered from any significant mental disorder. (*Id.* at 58). The sole mental health expert who speculated that Correll might have suffered from PTSD conceded that such a diagnosis was "only a possibility." (*Id.* at 56).

The district court also found that the evidence did not support Correll's contention, adopted by the panel, that he was given anti-psychotic medications while in custody. In reaching this factual finding, the district court noted that mental health experts for both parties scrutinized Correll's medical records from the California Department of Corrections and reported the absence of any indication that Correll was ever treated with anti-psychotic medication. (*Id.* at 55). Although Correll contended that he had been treated with a dosage of 25 milligrams of the drug Mellaril for a period of time as a juvenile, the government's mental health expert testified, without opposition, that at that dosage the drug would have served only as a mild tranquilizer. (*Id.* at 54 & n.41).

The panel fails to explain why it chose to ignore these factual findings made by the district court regarding Correll's psychological history.

The panel's failure to afford deference to the district court's factual findings is contrary to this Court's jurisprudence, and to the Federal Rules of Civil Procedure, as well. Establishing a line of Ninth Circuit authority abrogating this duty of deference would lead to secondary trials in the court of appeals, which "would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson*, 470 U.S. at 575.

II

THE NINTH CIRCUIT ESSENTIALLY ELIMINATED THE PREJUDICE PRONG OF THE STRICKLAND ANALYSIS BY PRESUMING PREJUDICE, AND BY FAILING TO CONSIDER THE FACTS AND CIRCUMSTANCES OF THE OFFENSE, THE AGGRAVATING FACTORS FOUND AT TRIAL, ARIZONA LAW, AND THE REBUTTAL EVIDENCE THAT THE STATE WOULD HAVE PRESENTED HAD THE ALLEGED OMITTED MITIGATION BEEN OFFERED.

A. *Failure to require Correll to prove prejudice.*

After improperly substituting its independent interpretation of the evidence for that of the district court, the panel failed to follow the prejudice analysis dictated by this Court in *Strickland.*

Finding that counsel performed deficiently because he failed to present evidence of Correll's alleged abusive childhood, his childhood head injury, his abuse of alcohol and illicit drugs, and his alleged psychological problems,[5] the panel concluded:

> In sum, there was a substantial amount of mitigating evidence available, which, taken together, is sufficient to raise a presumption of

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[5] (*Correll V*, Pet. App. A at 43–45.)

prejudice under the Supreme Court's standard in *Wiggins*, 539 U.S. at 534–38.

(*Correll V*, Pet. App. A at 45).

This analysis conflicts with this Court's jurisprudence. As Judge O'Scannlain noted in dissent:

> More alarming than its reconstruction of the record, however, the majority jumps with startling speed from its new factual determination that Correll received ineffective assistance of counsel to its ultimate conclusion that his habeas petition must be granted. In so doing, the majority ignores *Strickland's* second requirement, that even if Correll proves ineffective assistance of counsel, he must also prove that the result was actually prejudicial. *Wiggins*, 539 U.S. at 534 (citing *Strickland*, 466 U.S. at 692). As the Supreme Court has made clear, we do not presume prejudice from counsel's ineffective assistance. *Strickland*, 466 U.S. at 693. Rather, even if counsel's performance was deficient, Correll still bears the "highly demanding and heavy burden of establishing actual prejudice." *Allen* [*v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005)] (internal quotation marks omitted) (emphasis added). This burden "affirmatively [to] prove prejudice" requires Correll to show more than the mere possibility that counsel's performance prejudiced the outcome. *Strickland*, 466 U.S. at 693. Instead, Correll must demonstrate "a reasonable probability" that, but for counsel's

> constitutionally deficient performance, he would have received a lesser sentence. *Id.* at 695.

(*Id.* at 58–59) (O'Scannlain, dissenting). Judge O'Scannlain's observations are correct.

Contrary to the panel's assertion, and as Judge O'Scannlain correctly observed, this Court has never held that the failure to present certain types of mitigation raises a presumption of prejudice. Rather, in *Wiggins* the Court reaffirmed that, except in rare cases,[6] it is the defendant's burden to prove prejudice:

> In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense. *Strickland*, 466 U.S., at 692, 104 S.Ct. 2052. In *Strickland*, we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052.

Wiggins, 539 U.S. at 534.

The Ninth Circuit's ruling that *Wiggins* creates a

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[6] In the context of the Sixth Amendment right to effective counsel, this Court presumes prejudice in two limited circumstances, neither of which is present here: (1) where there is a complete denial of the right to counsel; and (2) where counsel labors under an actual conflict of interest. *Strickland*, 466 U.S. at 692 (citing *United States v. Cronic*, 466 U.S. 648, 659, & n.25 (1984); and *Cuyler v. Sullivan*, 466 U.S. 335, 345–50 (1980)).

presumption of prejudice is incorrect and should be corrected by this Court.

B. *Failure to consider the facts and circumstances of the crimes, the death-qualifying aggravating circumstances proved at trial, and relevant Arizona law.*

In its analysis leading to its alternative finding that Correll proved prejudice, the panel fails to even mention, much less consider, the facts and circumstances of Correll's crimes. (*Correll V*, Pet. App. A at 42–50). This is contrary to this Court's jurisprudence. *See Strickland*, 466 U.S. at 695 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). Moreover, the panel's error here was especially egregious given the brutal and disturbing nature of the murders:

> Snelling, Cady and D'Brito [the victims] must have been in great fear about their ultimate fate. Nabors had a gun, which he often lent to defendant [Correll], and additionally, defendant armed himself with a kitchen knife. Each victim was bound with duct tape, and this occurrence must have caused each victim great distress. This fear and worry must have greatly increased when they were loaded into Cady's car and driven into the desert. At no time could they be certain what these two armed men intended beyond robbery. In the desert, each victim was laid on the ground. Snelling was shot first, D'Brito was second, and then Cady was shot

> last. Therefore, Cady and D'Brito both witnessed the shooting of Snelling and must have realized they would be next. Cady further suffered because the gun misfired a couple of times before Nabors succeeded in killing her.

Correll I, 715 P.2d at 733–34.

Moreover, the Ninth Circuit panel compounded its error by additionally failing to consider the three death-qualifying aggravating factors found by the Arizona Supreme Court: (1) Correll's prior felony conviction involving the use or threat of violence against another person; (2) the fact that the murders were committed for pecuniary gain; and (3) the fact that the murders were committed in a cruel, heinous, or depraved manner. *Correll I*, 715 P.2d at 731–34. *See, e.g., Strickland*, 466 U.S. at 700 ("Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.").

The panel also failed to consider Arizona law in making its alternative finding of prejudice. Once again, this is contrary to this Court's jurisprudence:

> The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

Strickland, 466 U.S. at 694–95. The alleged omitted mitigation that the panel found so compelling—

Correll's personality disorder, his alleged drug addiction, his past psychological and medical history, and his dysfunctional family—would likely be afforded little mitigating weight under Arizona jurisprudence, both as it existed at the time of Correll's sentencing, as well as currently, because Correll failed to demonstrate any causal nexus between this proffered evidence and the crimes he committed. *See, e.g., State v. Murdaugh*, 97 P.3d 844, 860 ¶¶ 81–82 (Ariz. 2004) (drug impairment, personality disorder, and paranoia not afforded significant mitigating weight where there was no proven causal nexus between the proffered evidence and the defendant's crimes); *State v. Hoskins*, 14 P.3d 997, 1021–23 ¶¶ 107–18, (Ariz. 2000) (antisocial or borderline personality disorder, and dysfunctional family history, found not significantly mitigating in absence of causal link to crime). *See also State v. Gerlaugh*, 698 P.2d 694, 704 (Ariz. 1985); *State v. Vickers*, 633 P.2d 315, 325 (Ariz. 1981); *State v. Bishop*, 622 P.2d 478, 482 (Ariz. 1980). Additionally, Arizona sentencers typically afford little mitigating weight to evidence of a dysfunctional or abusive childhood. *See, e.g., State v. Jackson*, 918 P.2d 1038, 1049 (Ariz. 1996) ("We are well aware that children who are emotionally and physically abused are adversely affected to some extent for the rest of their lives. Our criminal dockets are filled with such people. But we have never reduced a defendant's death sentence on such a basis").

C. *Failure to consider the rebuttal evidence that the state would have presented had the alleged omitted mitigation been presented.*

The panel decision overlooks the fact that presenting the additional mitigation evidence would have opened the door to extremely damaging rebuttal evidence. In dissent, Judge O'Scannlain notes:

> [T]he majority's conclusion that Correll has met the heavy burden of demonstrating actual prejudice ignores a mountain of precedent which requires us to consider not only the benefits of the ostensibly mitigating evidence counsel failed to present, but also its potential drawbacks. . . . The majority fails to realize that . . . much of the new mitigating evidence Correll offers would have enabled the prosecution to present very damaging evidence in rebuttal.

(*Correll V*, Pet. App. A at 60–61), O'Scannlain, J. dissenting).

Judge O'Scannlain's observations are well taken. For example, had Correll offered his mental health records in mitigation, the State would have used those same records to show that while "undergoing mental health treatment, he raped a female psychotic patient," he had escaped "numerous times" from health treatment facilities, that during one escape attempt, Correll "took hostages by the use of a butcher knife and letter opener, which resulted in one of the hostages having a heart attack," and that "on numerous occasions, [Correll] turned down institutional efforts to provide him with mental health treatment." (*Correll IV*, Pet. App. B. at 60–61). *See, e.g.*, *Burger v. Kemp*, 483 U.S. 776 , 793 (1987) (counsel's failure to present psychological records did not amount to ineffective

assistance because the records suggested "violent tendencies" that would have undermined counsel's strategy of portraying petitioner's actions as the result of another person's "strong influence upon his will").

Similarly, Correll's proffer of the testimony of his mental health expert, Dr. Becker, concerning her opinion whether Correll's crimes might be attributable to his dysfunctional family, "would have produced a doubled-edged dilemma," opening the door to extremely damaging rebuttal testimony that Correll "regularly participated in incest by sexually molesting his sister Robin." (*Id.* at 80). *Cf. Darden v. Wainwright*, 477 U.S. 168, 186 (1986) ("Any attempt to portray petitioner as a nonviolent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions.").

Additionally, had Correll offered the testimony of his sister, Robin, at sentencing, in order to bolster his claim that he was under the influence of methamphetamine when the victims were murdered,

> she could have been cross-examined about her knowledge of Petitioner's whereabouts at the time of the crimes. Had Robin testified concerning Petitioner's conversations about his need to leave town quickly, she would have disclosed that Petitioner was with John Nabors [Correll's accomplice] and had wanted an immediate ride out-of-state very soon after the murders occurred. Such testimony would have totally eliminated any mitigating weight from Petitioner's claim of innocence and residual

> doubt (i.e., the guilt phase misidentification defense).

(*Correll IV*, Pet. App. B at 33–34).

Thus, much of the new evidence proffered by Correll would not have been helpful, because it would have "opened the door" to potentially devastating rebuttal evidence.

As Judge Callahan succinctly observed:

> This case presents an instance in which counsel's instinct that an investigation into Correll's medical and mental history would not yield any positive evidence, although an unacceptable reason for not conducting an investigation turns out after 17 years, a full investigation, and a 9-day evidentiary hearing, to have been correct. The panel majority does not really deny that there is no positive evidence, but argues that evidence concerning Correll's alleged brain damage, sociopathic or antisocial personality disorder, drug use, and troubled family, constitute "classic mitigating circumstances." The second prong of the Strickland test, however, does not call for an abstract analysis of what might be mitigating evidence, but a determination of whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.
>
> . . .

> The record in this case clearly shows that the presentation of evidence of Correll's alleged brain damage, sociopathic or antisocial personality disorder, drug use, and troubled family would not have made any difference to the trial judge or the Arizona Supreme Court. This conclusion is solidly based on the horrific nature of the murders, the applicable constitutional and state law as it existed when Correll was tried, the perceived nature of the trial judge's jurisprudence, and the incredibly damaging nature of the rebuttal evidence. . . .

(*Correll V*, Pet. App. A at 20–22, Callahan, J., dissenting from denial of rehearing en banc).

This Court should grant certiorari review because, left uncorrected, the panel's erroneous legal holdings will establish Ninth Circuit authority to the effect that: (1) a petitioner need not prove prejudice; and (2) a reviewing court need not consider the facts and circumstances of the offense, the death-qualifying aggravating circumstances found at trial, local law governing the decision-making of the trial court, or whether presenting the alleged omitted mitigation would "open the door" to damaging rebuttal. Such a result is not only contrary to *Strickland*, but it undermines the Court's entire Sixth Amendment jurisprudence with respect to the right to effective counsel, effectively eliminating the prejudice prong of the *Strickland* analysis.

CONCLUSION

Based upon the foregoing arguments, the petition for a writ of certiorari should be granted.

Respectfully submitted

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Supreme Court, U.S.
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No. 08-430

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

MICHAEL EMERSON CORRELL,

Respondent.

APPENDIX
On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

Volume 1 of 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT.

Michael Emerson Correll, *Petitioner-Appellant,*	)	No. 03-99006.
v.	)	D.C. No. CV-87-01471- PHX-SMM
Charles L. RYAN, Warden, Acting Director, Arizona Department of Corrections, Dora B. Schriro, Director, *Respondent-Appellee.*	)	ORDER AND AMENDED OPINION AND AMENDED DISSENT

Appeal from the United States District Court
For the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted
Sept. 26, 2005—San Francisco, California

Filed May 14, 2008.

Before: Mary M. Schroeder, Diarmuid F. O'Scannlain
and
Sidney R. Thomas, Circuit Judges

Opinion by Judge Thomas
Dissent by Judge O'Scannlain

COUNSEL

Thomas Phalen and Jon M. Sands, Phoenix, Arizona, for the appellant.

James P. Beene, Kent E. Cattani, and Terry Goddard, Phoenix, AZ, for the appellee.

ORDER

In response to the petition for rehearing, the panel has elected to file an amended opinion and amended dissent. The amended opinion and dissent are filed concomitantly herewith. With the filing of the amended opinion and dissent, Judges Schroeder and Thomas voted to deny the petition for rehearing and rehearing en banc. Judge O'Scannlain voted to grant the petition for rehearing and rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R.App. P. 35.

The petition for rehearing and rehearing en banc is DENIED. The Court will entertain a further petition for rehearing and rehearing en banc as to the

amendments made to the opinion. See Ninth Circuit General Order 5.3(a).

All pending motions are DENIED.

Judge CALLAHAN'S dissent from rehearing en banc follows:

CALLAHAN, Circuit Judge, with whom KOZINSKI, Chief Judge, and O'SCANNLAIN, KLEINFELD, TALLMAN, and BEA, Circuit Judges, join, in dissenting from the denial of rehearing en banc:

I respectfully dissent from our denial of rehearing en banc because the panel majority fails to give deference to the district court's factual findings as required by *Hovey v. Ayers*, 458 F.3d 892, 900 (9th Cir.2006), and improperly interprets the test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), so as to create an almost irrebutable presumption of prejudice.

Over twenty years ago, Michael Correll was convicted of three counts of first-degree murder, with four aggravating circumstances, and sentenced to death. *State v. Correll*, 148 Ariz. 468, 471, 478-81 (1986). The Arizona Supreme Court affirmed the convictions, three of the aggravating circumstances, and the sentence. *Id.* at 485. In his federal habeas petition Correll contends that he was denied the effective assistance of counsel at trial as guaranteed by the Sixth Amendment. On remand from this court, the district court conducted a nine-day evidentiary

hearing. The district court concluded that although the performance of Correll's attorney at sentencing was deficient, Correll was not prejudiced.

The panel majority's opinion reweighs the evidence before the district court and reverses its conclusion by ignoring the district court's factual findings as well as the second prong of the *Strickland* test for ineffective assistance of counsel. The majority opinion collapses the two *Strickland* prongs into one prong. The opinion implies that if counsel makes a strategic decision not to investigate or present what it calls "classic mitigating circumstances" that would nonetheless open the door to more damaging aggravating evidence, prejudice will be presumed. It compounds this mistake by failing to appreciate that in this case even if a presumption of prejudice arises, the presumption was, as the district court found, rebutted. Moreover, if the facts in this case do not rebut the majority's presumption of prejudice, the presumption in effect becomes irrebutable. For these reasons, I dissent from our decision not to rehear this matter en banc.

I

Although it is not clear from the panel majority opinion, the district court in its 109-page opinion found that trial counsel's performance had been deficient on only two matters. First, the district court held:

> Notwithstanding *Strickland's* recognition that defense counsel's duty to investigate, develop and present mitigating evidence

> can be reasonably based on a judge's sentencing tendencies, the Court reluctantly and narrowly concludes that [counsel's] performance was deficient because he failed to review Petitioner's mental health records ... before making sentencing strategy decisions.

Second, the district court again narrowly concluded that given the overwhelming aggravating circumstances that Correll faced, counsel "should have obtained the medical treatment records" concerning Correll's head injury when a wall fell on him when he was seven years old.

The district court, however, rejected a number of other challenges to the attorney's performance. For example, the district court noted:

> The Court specifically finds that [counsel] did maintain regular contact with Petitioner prior to sentencing and rejects Petitioner's allegation that [counsel] only spent five minutes with him between conviction and sentence.... Petitioner did provide names of persons for [counsel] to contact prior to sentencing, including Susan Curry. [Counsel] followed-up and interviewed or tried to interview the persons Petitioner suggested.... The witnesses were not able to provide relevant useful mitigation information. In fact, in many instances, the witnesses only provided

> inculpatory and non-mitigating information.

(Emphasis in original.) The district court rejected the contention that counsel had improperly failed to present mitigating evidence concerning drug use. It also found that counsel's performance was not deficient in failing to present expert testimony on methamphetamine intoxication at the time of the crime because "there was no lay witness testimony to support Petitioner's intoxication at the time of the crimes." In addition, the district court rejected challenges to counsel's limited investigation of Correll's family background. It concluded that information concerning incest in the family was not available to counsel because neither Correll nor any of the family members that counsel interviewed provided him with any information. The district court also concluded that counsel "was not deficient in failing to present evidence corroborating the child abuse allegations because such corroborating testimony was not reasonably available to, and thus could not have been obtained by [counsel] at sentencing." As to the charge that Correll suffered from his mother's religious fanaticism, the district court concluded that counsel had the available information regarding Petitioner's mother being a Jehovah's Witness, but reasonably chose to present such evidence as an abandonment issue.

Thus, as indicated by Judge O'Scannlain's dissent, a review of the district court's 109-page memorandum of decision and order, although confirming that counsel provided deficient representation when he failed to seek documents

relating to Correll's mental health and medical conditions, also shows that counsel's efforts on behalf of his client were considerably more nuanced than implied by the panel majority.

II

The panel majority alleges that defense counsel basically abandoned his client at sentencing because Arizona law, as it then existed, mandated the death penalty when a defendant had a qualifying prior conviction, and there was no mitigating evidence. Indeed, this would be a much easier case if this assertion were true. However, it misstates the law in a critical manner, and implies the existence of clearly mitigating evidence where no clearly mitigating evidence exists.

The Arizona Supreme Court affirmed Correll's conviction, the presence of three aggravating circumstances, and his sentence.[1] The Arizona Supreme Court did not find that counsel had abandoned Correll. Rather it held:

> The trial court found no mitigating circumstances which called for leniency. Defendant offered five mitigating circumstances: upbringing, cooperation in preparation of the pre-sentence report, psychological problems such

[1] It should be noted that the majority does not suggest that any investigation or effort by counsel could have prevented the Arizona courts' finding three aggravating factors.

> that he did not understand the wrongfulness of his conduct, his minor participation in the murders, and age. A.R.S. § 13-703(G) provides that any relevant mitigating circumstance proffered must be considered in determining whether to impose the death penalty. We find that none of these factors, alone or in combination, are sufficiently substantial to call for leniency.

State v. Correll, 148 Ariz. at 482. Later in its opinion, after affirming the existence of three aggravating factors, the Arizona Supreme Court noted that it had "also considered the mitigating circumstances offered by defendant, and[ ] conclude[d] that even in combination the mitigating circumstances are not sufficiently substantial to call for leniency." *Id.* at 483. Thus, it appears that Arizona law did not mandate the death penalty, but required that the courts determine whether there were factors that were "sufficient to call for leniency." Furthermore, the Arizona Supreme Court's opinion rebuts the panel majority's suggestion that counsel had abandoned Correll at the sentencing hearing.

In addition, much of the majority's criticism of counsel's performance fails to recognize the critical difference between raising reasonable doubt as to the prosecutor's case for the death penalty and presenting affirmative evidence of mitigating circumstances. In *Williams v. Woodford*, 384 F.3d 567 (9th Cir.2004), we recognized the validity of the lingering-doubt defense

at the penalty phase, particularly as it "did not require introduction of mitigating evidence that would open the door to damaging rebuttal evidence." *Id.* at 624. We wrote:

> based upon our review of the reasons underlying [counsel's] penalty-phase strategy, we cannot fault [counsel's] sound tactical decision to present a lingering-doubt defense in lieu of a defense based upon mitigating evidence of Williams's family and life history, drug use, or mental state. We note in this regard that the defense of " 'residual doubt has been recognized as an extremely effective argument for defendants in capital cases.' " *Lockhart v. McCree*, 476 U.S. 162, 181, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) (quoting *Grigsby v. Mabry*, 758 F.2d 226, 248 (8th Cir.1985) (en banc) (Gibson, J., dissenting)). A comprehensive study on the opinions of jurors in capital cases concluded:
>
> > 'Residual doubt' over the defendant's guilt is the most powerful "mitigating fact." ... [T]he best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt.
>
> Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98

> Colum. L.Rev. 1538, 1563 (1998) (footnote omitted); *accord* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J.Crim. L. 1, 28 (1988) ("The existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied.").

Williams, 384 F.3d at 624.

Here counsel represented a client who insisted on his innocence.[2] Under such circumstances, a lingering-doubt defense was not only reasonable, but in light of then existing Arizona law and the double-edged nature of the so-called "classic mitigating evidence," perhaps the only reasonable approach available.

III

It follows that because Arizona law did not mandate the entry of the death penalty and counsel did not abandon Correll, the second prong of the *Strickland* test for ineffective assistance of counsel cannot be

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[2] The district court noted:

> Based on Petitioner's continuing claim of innocence and Petitioner's failure to prove otherwise, the Court concludes that Petitioner did not discuss or attempt to help [counsel] prove that he was intoxicated when he committed the crime or that his condition at that time of the crimes would mitigate his sentence.

presumed. Indeed, the purposes of the district court's nine-day evidentiary hearing was to determine whether the evidence that counsel failed to discover could possibly have been "sufficiently substantive to call for leniency." What the district court found, and the majority does not really dispute, is that there was no evidence that might humanize Correll or portray Correll as sympathetic. Rather, the evidence concerning Correll's sociopathic or antisocial personality disorder, drug use, and troubled family was double-edged. Although the evidence might offer some explanation for Correll's criminal acts, the evidence would also shed light on his prior criminal acts, violent tendencies, and unremorseful attitude. The Supreme Court has held that evidence of a troubled upbringing and mental issues can be mitigating. *See Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534-35 (2003). However, such evidence is also recognized to be double-edged, and it can be a reasonable strategic choice not to present such evidence. *Williams*, 384 F.3d at 619-20.[3] This case

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[3] In *Williams*, we stated:

> The Supreme Court and this court have consistently held that counsel's performance is not deficient for the failure to present evidence in mitigation at the penalty phase when counsel's decision is based upon a reasonable tactical determination that the mitigating evidence would allow for the introduction of rebuttal evidence 'that might be literally fatal.' *Burger [v. Kemp]*, 483 U.S. [776,] at 791-94, 107 S.Ct. 3114 [(1987)] (counsel's failure to present any mitigating evidence, including the defendant's own testimony or the testimony of the defendant's mother that he

(Continued)

requires a determination of whether the mitigating evidence could have been sufficiently substantial to call for leniency. In other words, whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

This question must be asked in the context of Arizona law as it then existed. When Correll was tried, the death penalty was not the province of a jury, but the responsibility of the trial judge and the Arizona Supreme Court. Accordingly, the inquiry is not whether a juror might possibly have been moved to alter his or her view of the case, but whether there is a reasonable possibility that any of the mitigating evidence would have changed the trial judge's or the Arizona Supreme Court's positions.

IV

By not asking this question, the panel majority fails to appreciate that Correll has not, and cannot, meet the second prong of the *Strickland* test for ineffective assistance of counsel. Instead the majority

(Continued).

> had an exceptionally unhappy and physically abusive childhood. or the expert testimony of a psychologist, was reasonable professional judgment because the testimony would risk bringing before the jury evidence of the defendant's unremorseful attitude, violent tendencies, and prior criminal acts).

384 F.3d at 619-20

(a) improperly substitutes its view of the evidence for the district court's findings, (b) fails to appreciate Arizona's death penalty provisions that were in existence when Correll was tried, and (c) ignores the fact that presentation of the alleged "classic mitigating evidence" would have opened the door to overwhelmingly damaging rebuttal evidence.

A. The panel majority's improper substitution of its independent analysis of the record is well presented in Judge O'Scannlain's dissent; however, its treatment of two issues—Correll's alleged brain injury and the allegation that he was under the influence of drugs at the time of the crimes—illustrates the extent to which the majority's conclusions differ from the evidence in the record and the district court's perspective.

Addressing Correll's alleged brain injury, the panel stated:

> When Correll was seven, a brick wall collapsed on his head. Although he was unconscious for some time after the accident, his parents did not seek medical treatment until several days later when he was still not back to normal. Several experts testified that this type of accident and the symptoms Correll exhibited then and now indicate a high likelihood of brain impairment.

The district court, however, made the following findings:

> Petitioner received a head injury on April 8, 1967, when he was 7, at which time his parents took him to see their family doctor. Four days later, Petitioner was vomiting and again taken to the family doctor where an X-ray was taken and an EEG scheduled. On April 14, 1967, an EEG was done. On April 15, in response to more vomiting, Petitioner's parents took him to the emergency room at Children's Hospital of Los Angeles. At the hospital, he was seen by a treating physician, who diagnosed a subgaleal hematoma, which is a bruise or collection of blood under the scalp, but above the skull. The treating physician recommended a neurosurgery consultation, which was done. The doctor in the neurosurgery clinic also diagnosed Petitioner with a subgaleal hematoma. On May 3, 1967, Petitioner was brought back to the neurosurgery clinic for a follow-up visit. The follow-up visit noted that Petitioner's hematoma cleared in 5 days and that Petitioner was alert and well.

In addition, the record indicates that when Correll was examined by experts around 2000, his brain functioned at a high level, although there was

some evidence of impairment in the prefrontal lobe.[4] Also, there was little in the record to connect the alleged impairment in 2000 to the 1967 accident. The district court, having had the benefit of hearing from both parties' neuropsychologists, concluded that Correll did not suffer any brain injury from the 1967 accident.

The majority, however, chastises the district court for making such a finding asserting that it should "have decided only whether there existed a 'reasonable probability' that 'an objective fact-finder' in a state sentencing hearing would have concluded that Correll had a brain injury that impaired his judgment at the time of the crimes." But the majority's correction of the standard cannot change the fact that the district court determined that there was no reasonable probability that a fact-finder would find that Correll had a brain injury that impaired his judgment, and that the majority, rather than defer to this reasonable perspective, improperly substitutes its view of the record for that of the district court.

The majority's myopic view of the record also allows it to conclude that "the evidence of Correll's methamphetamine use on the night of the crimes, had it been fully presented, could have risen to the level of a statutory mitigator." The majority states that there

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[4] The district court noted that Dr. Martell, a neuropsychologist, testified that this mild impairment did not "have a lot of import for [Correll's] everyday behavior" and that "of all the capital defendants he has tested, [Correll] is one of the highest functioning defendants."

was undisputed evidence induced that Correll was addicted to methamphetamine and had used it on the day of the crime, and further relies on expert testimony "that gross methamphetamine intoxication, unlike gross alcohol intoxication, is not necessarily apparent to outside observers."

The majority's conclusion cannot be reconciled with Arizona law at the time of the crimes and the evidence in the record. As noted by Judge O'Scannlain, Arizona law provided "[a] defendant's intoxication or alcoholism at the time of the offense is a mitigating circumstance if the evidence shows that it significantly impaired the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *State v. Zaragoza*, 135 Ariz. 63, 659 P.2d 22, 30 (Ariz.1983) (emphasis added).

The district court, after holding a nine-day evidentiary hearing, found:

> * due to Correll's continued maintenance of his innocence, Correll did not discuss his mental state with counsel and did not attempt to help counsel prove that he was intoxicated when he committed the crimes;
>
> * counsel interviewed the persons Correll indicated he was with prior to when the crimes were committed and they did not indicate that he was grossly intoxicated by alcohol abuse or drug abuse on the day of the crimes, but did indicate that

Correll had been using methamphetamine prior to the day the crimes were committed;

* "none of the witnesses could have testified that they observed Petitioner injecting methamphetamine in close proximity to the time the crimes occurred";[5]

* the first thing that Correll and Nabors asked Snelling when they gained entry into his trailer home was whether he had any speed;

* Correll had spent the vast majority of

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[5] The district court noted that at the evidentiary hearing, Robin Correll, petitioner's sister, testified that on the morning before the crimes she witnessed Correll inject some amount of methamphetamine. However, Robin did not testify at the trial. The district court explained:

> Had Robin testified about Petitioner's use of methamphetamine the day prior to the crimes, she could have been cross-examined about her knowledge of Petitioner's whereabouts at the time of the crimes. Had Robin testified concerning Petitioner's conversations about his need to leave town quickly, she would have disclosed that Petitioner was with John Nabors and had wanted an immediate ride out-of-state very soon after the murders occurred. Such testimony would have totally eliminated any mitigating weight from Petitioner's claim of innocence and residual doubt (i.e., the guilt phase misidentification defense).

his life incarcerated in prison where his access to drugs was limited; [6]

* Correll's self-reporting of drug use was severely limited due to the lack of corroboration; [7]

* Correll's expert's testimony was "thoroughly impeached" because he admitted that he only minimally considered the facts of the crimes before reaching his conclusion, he admitted that the facts did not necessary establish that Correll had prominent hallucinations or delusions, and the facts of the crimes show that Correll "was involved in deliberate acts, planning, conspiring, avoiding detection, awareness of wrongdoing, and that he was oriented to

---

[6] The district court noted that except for 229 days, Correll had been incarcerated for the 9-year period between October 1975 and March 1984, a month before the crimes.

[7] The district court concluded:

> The court does not credit Petitioner's unsubstantiated self-report that he abused methamphetamine every day before the crimes were committed. Petitioner chose not to testify at the evidentiary hearing; Petitioner chose not to fully cooperate with Dr. Matthews's examination regarding the issue of drug abuse. Because of the obvious motive to fabricate, Petitioner's self-serving statements about his drug usage prior to the crimes is unreliable and subject to searching skepticism.

time, place and reality."

* the determination by Arizona's expert in addiction that Correll was not in a substance abuse psychosis was credible because "he utilized the facts of the case to support his opinion and tied his opinion to the facts of the case;"

* "the evidence shows that it was Petitioner who remained calm when the gun misfired as Nabors was trying to kill Robin Cady. It was Petitioner who encouraged Nabors to remain calm as there were no cars coming, to get a shell chambered and shoot Cady. Such behavior at the time of the crime does not demonstrate intoxication and, in fact, undercuts an assertion of intoxication."

Accordingly, the majority's assertions that there is a reasonable probability that a fact-finder could have found that Correll had a brain injury or that he was intoxicated by drugs at the time of the crimes are not supported by the record. More importantly, the majority's reweighing of the evidence violates our established law of deferring to the district court's findings. *Hovey*, 458 F.3d at 900 ("[F]actual findings made by the district court are reviewed under the 'significantly deferential' clearly erroneous standard, in which we accept the district court's findings of fact absent a 'definite and firm conviction that a mistake

has been committed.' ") (citations omitted).[8]

Here, the district court held a nine-day evidentiary hearing and made detailed findings of fact on remand from this court. We abuse our role as an appellate court when we cavalierly ignore the findings that a district court makes on remand. Again, the question is not whether reasonable minds might differ, but whether a review of the record creates "a definite and firm conviction that a mistake has been committed."[9] The majority, in pursuing "some mitigating evidence[that] could have spared Correll's life," fails to appreciate-as it is required to-that the district court's contrary position is reasonable and entitled to deference.

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[8] Our deference to the district court's factual findings did not arise in *Hovey*, 458 F.3d at 900, but is of a longstanding principle of habeas review. *See Silva v. Woodward*, 279 F.3d 825, 835 (9th Cir. 2002) ("[O]ur review for clear error is 'significantly deferential,' in that we must accept the district court's factual findings absent a 'definite and firm conviction that a mistake has been committed.'"); *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000) ("Clearly erroneous review is 'significantly deferential,' requiring that the appellate court accept the district court's findings absent a 'definite and firm conviction that a mistake has been committed.'"); *McMillan v. United States*, 112 F.3d 1040, 1044 (9th Cir. 1997) (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 ... (1993).).

[9] In *Hayes v. Woodford*, 301 F.3d 1054, 1067 n.8 (9th Cir. 2002), we noted that "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." (internal quotation omitted).

B. Although counsel's decision not to investigate Correll's medical and psychiatric records fell below an acceptable level of competence, his underlying reasons may be relevant to a determination of whether the failure to investigate was prejudicial. The district court explained defense counsel's perspective as follows:

> [Counsel] estimated that Petitioner had one chance in twenty for a life sentence if he did not present the psychological diagnosis but only one chance in fifty if he presented Petitioner's psychological diagnosis to Judge Howe [the trial judge].... Rather than argue Petitioner's personality disorder to Judge Howe, [counsel] decided that Petitioner had a better chance to avoid the death penalty if he portrayed that Petitioner was involved in a drug ripoff which had gone terribly wrong, that Petitioner had only been a follower in the matter, that he had not been the trigger-man as to the three people who died, that Gary Snelling had reported to police that Petitioner was under the influence of drugs and/or alcohol at the time of the crimes, and that he should be shown sympathy because his family abandoned him at the age of 14.... [Counsel] concluded that any psychological diagnosis of Petitioner could not be presented and argued without producing witnesses and other

> evidence that might destroy any residual doubt arising from the presentation of his misidentification defense at trial and the mitigation theory [counsel] intended to present regarding Petitioner being only a follower in the drug mishap and not the trigger-man.

The district court further explained:

> [Counsel] acknowledged that Judge Howe would consider and give effect to constitutionally relevant mental health evidence, but believed that once Judge Howe knew Petitioner's diagnosis, he would find it easier not to show sympathy and sentence him to death.... Likewise, [counsel] did not believe that Judge Howe would give substantial mitigating weight to antisocial personality disorder evidence. ... On the other hand, [counsel] did believe that there was some possibility that Judge Howe might give Petitioner a break for not being the trigger-man in the murders.

Although the panel majority opines that defense counsel "was afraid of the sentencing judge," a review of the record indicates that counsel's evaluation of Judge Howe's outlook was probably accurate and definitely reasonable. Furthermore, the panel majority's criticism of counsel's focus on Judge Howe

ignores that under existing Arizona law, it was Judge Howe who was responsible for sentencing Correll. If Judge Howe imposed the death sentence, the Arizona Supreme Court would review that decision. However, if Judge Howe had declined to impose the death sentence, it is doubtful that Arizona or the Arizona Supreme Court could have, or would have, sought to change that decision.[10]

C. Perhaps the most critical factor, which is not really denied by the majority, is that the introduction of the "classic mitigating circumstances" would open the door to the admission of overwhelming negative evidence. The district court explained:

> Although the Court has attempted to recount the mitigation evidence presented at Petitioner's evidentiary hearing in detail, the bottom line is clear:

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[10] The majority dismisses counsel's perspective concerning Judge Howe by labeling it a presumption that "the judge would not follow the law." The district court, however, specifically rejected the suggestion that Judge Howe would not follow the law. Rather, counsel thought that if Judge Howe found out that Correll was a sociopath or psychopath, he was more likely to sentence him to death. The district court found counsel's perspective to be credible. Moreover, Judge Howe's alleged perspective does not appear to be either irrational or illegal. In *Strickland*, the Supreme Court recognized that the trial judge's known views could be considered by counsel. 468 U.S. at 699. The trial judge's views were particularly important in Correll's case as three aggravating circumstances were established beyond dispute and a life sentence depended on Judge Howe finding sufficient mitigating circumstances to warrant leniency.

a strategy of presenting Petitioner's emotional and mental problems, his condition at the time of the crime, or as a victim of an abusive and tragic upbringing, would have required the following additional disclosures of facts, none of which are "mitigating:" (i) Petitioner's rape of a female psychotic patient while he was undergoing mental health treatment for his antisocial personality disorder and mild depression ...; (ii) Petitioner's numerous escapes from mental health treatment facilities and rejections of institutional efforts to provide him with mental health treatment ...; (iii) Petitioner's hostage taking and armed aggression against mental health workers in an escape attempt from a mental health treatment facility ...; (iv) the underlying factual basis of Petitioner's prior conviction for armed robbery ...; (v) the revelation that, shortly after the murders were committed, Petitioner and Nabors woke up Robin Correll and informed her that they needed a ride out-of-state right away ...; (vi) Petitioner's lack of effort to seek any type of treatment for his substance abuse problem ...; (vii) Petitioner's acts of regularly molesting his sister Robin ...; (viii) the conclusion of the social evaluation at age 18 that Petitioner was not a candidate for probation and was a danger to the community ...; (ix)

> additional information showing the efforts of Petitioner's parents to deal with his drug abuse problem and obtain psychological treatment for him following his armed threat against a teacher at school ...; (x) that Petitioner had no desire to work but only wished to enjoy himself ...; and (xi) Petitioner's statement that when he committed the 1978 armed robberies that it gave him a strong sense of power and excitement . . . .

The district court also agreed with counsel that the prosecutor "had a reputation of excellent preparation and that she would have left no stone unturned in her opportunity to rebut any mitigation evidence presented."

The panel majority seeks to minimize the negative impact of this evidence by suggesting that a "significant portion" of the "damaging rebuttal evidence was already available through the pre-sentence report." This is a misleading overstatement. Such facts as Correll's molestation of his sister, his use of minors to facilitate armed robberies, and his rape of a psychotic female patient were not set forth in the pre-sentence report. Moreover, as has already been noted, there is a world of difference between raising questions as to the sufficiency of the State's presentation and introducing "mitigating evidence that would open the door to damaging rebuttal evidence." *Williams*, 384 F.3d at 624.

Regardless of how much of the negative evidence

was already before the trial court, the inquiry remains whether further presentation of the evidence would have been substantial enough to mitigate a death sentence.[11] The majority does not really take issue with the district court's determination that Correll. at most, had an antisocial personality disorder, and that there was "insufficient evidence to support that [Correll] has ever suffered from any major mental illness, whether PTSD, a major depressive disorder, or a bipolar disorder." Instead, the panel majority opines that the damaging rebuttal evidence "could, in the hands of a competent attorney, have been used to support Correll's claims of dysfunctional upbringing and continuing mental disorder." This may be true in the abstract, but in light of the horrific nature of the crimes, Correll's defense of innocence, the extant standard for the imposition of the death penalty, and the damaging rebuttal evidence, the majority engages in wishful thinking.

Here we are concerned with the possible impact of damaging rebuttal evidence on Judge Howe and the Arizona Supreme Court. The district court properly noted that the standard is high:

> Based on both the horrific facts surrounding these murders and [Correll's] prior criminal history, this is the type of case that demands powerful

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[11] Ironically, the panel majority's suggestion that the evidence was in the pre-sentence report would appear to weigh against its conclusion that the presentation of the evidence would have made a difference.

> mitigation before it may be said that confidence in the outcome at sentencing has been undermined. *See Bonin v. Calderon*, 59 F.3d 815, 836 (9th Cir. 1995); *see also Gerlaugh v. Stewart*, 129 F.3d 1027, 1042-43 (9th Cir. 1997) (horrific crime facts require substantial mitigation before it may be said that the balance of aggravating factors did not warrant death); *Campbell* [*v. Kincheloe*], 829 F.2d [1453,] 1464 [(9th Cir. 1987)] (overwhelming aggravating factors and the heinous nature of the crime required more than insubstantial mitigation to establish prejudice).

Also, Arizona argues that under Arizona law:

> Correll's personality disorder, his alleged drug addiction, his past psychological and medical history, and his dysfunctional family, as non-statutory mitigators, are not entitled to any significant mitigating weight, because Correll failed to demonstrate any causal nexus between these mitigators and the crimes he committed. [*State*] *v. Murdaugh*, 209 Ariz. 19, 35, 97 P.3d 844 ... (2004) (drug impairment, personality disorder, and paranoia not entitled to significant mitigating weight because there was no proven causal nexus between them and the defendant's crimes); [*State*] *v. Hoskins*, 199 Ariz. 127, 151-53, 14 P.3d

> 997 ... (2000) (antisocial or borderline personality disorder, and dysfunctional family, not mitigating in absence of causal link to crime.).

Furthermore, even the panel majority does not question that the state proved three aggravating factors. In light of the horrific nature of the murders, the reasonably perceived nature of the trial judge's jurisprudence, and the incredibly damaging nature of some of the rebuttal evidence, it is not reasonable to conclude that the admission of the evidence would have had any mitigating impact on either Judge Howe or the Arizona Supreme Court.

V

This case presents an instance in which counsel's instinct that an investigation into Correll's medical and mental history would not yield any positive evidence, although an unacceptable reason for not conducting an investigation, turns out after 17 years, a full investigation, and a 9-day evidentiary hearing, to have been correct. The panel majority does not really deny that there is no positive evidence, but argues that evidence concerning Correll's alleged brain damage, sociopathic or antisocial personality disorder, drug use, and troubled family, constitute "classic mitigating circumstances." The second prong of the Strickland test, however, does not call for an abstract analysis of what might be mitigating evidence, but a determination of whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Strickland*, 466 U.S. at 694.

The Supreme Court reiterated this standard in *Woodford v. Visciotti*, 537 U.S. 19, 22, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002), when it reversed this court for failing to defer to the California Supreme Court's determination that trial counsel's inadequacy was not prejudicial.[12] Moreover, in *Allen v. Woodford*, 395 F.3d

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[12] The Supreme Court's description of the California Supreme Court's determination – that it held we had improperly failed to accept – bears an uncanny resemblance to the district court's determination in this case. The Supreme Court noted:

> The California Supreme Court concluded that despite the failure to present evidence of respondent's "troubled family background," which included his being "berated," being "markedly lacking in self-esteem and depressed," having been "born with club feet," having "feelings of inadequacy, incompetence, inferiority," and the like, moving "20 times" while he was growing up, and possibly suffering a "seizure disorder," the aggravating factors were overwhelming. In the state court's judgment, the circumstances of the crime (a cold-blooded execution-style killing of one victim and attempted execution-style killing of another, both during the course of a preplanned armed robbery) coupled with the aggravating evidence of prior offenses (the knifing of one man, and the stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby) was devastating. The California Supreme Court found these aggravating factors to be so severe that it concluded respondent suffered no prejudice from trial counsel's (assumed) inadequacy.

Woodford, 537 U.S. at 26 (citations omitted).

979 (9th Cir.2005), we first found that "counsel's failure to prepare for the sentencing phase until a week before that phase began, and his resulting failure to thoroughly investigate and present Allen's mitigation case, was constitutionally deficient," *id.* at 1002, but denied relief because we could not "conclude that there is a reasonable probability, had trial counsel presented the potential mitigation evidence developed during habeas, that the jury would have weighed the evidence in favor of a life sentence." *Id.* at 1005. Although Allen presented a very different factual situation, it does require that we look beyond the fact of counsel's deficient performance to determine whether it had any effect on the result.

The record in this case clearly shows that the presentation of evidence of Correll's alleged brain damage, sociopathic or antisocial personality disorder, drug use, and troubled family would not have made any difference to the trial judge or the Arizona Supreme Court. This conclusion is solidly based on the horrific nature of the murders, the applicable constitutional and state law as it existed when Correll was tried, the perceived nature of the trial judge's jurisprudence, and the incredibly damaging nature of the rebuttal evidence. It is one thing to cast about for alternate theories after the imposition of the death penalty, and an entirely different thing to argue that a defendant who has been convicted by a jury of first-degree murder should not receive the death penalty because he is a sociopath who cannot control himself. Correll's counsel thought that there was a one in twenty chance that Judge Howe would not impose the death penalty if the murders were presented as the

result of a "routine robbery, drug rip off that went bad." The presentation of further evidence of Correll's mental and medical records, antisocial behavior, and prior crimes – far from eliciting sympathy – would have rendered a death sentence a certainty rather than a probability.

The panel majority's opinion is not only factually wrong, but more importantly for Ninth Circuit law, fails to follow the standard for ineffective assistance of counsel mandated by the Supreme Court and followed in our prior cases. First, instead of fairly asking separately whether counsel's performance was deficient and whether the deficient performance was prejudicial, the opinion collapses the two standards into a single inquiry of whether counsel's performance was deficient. In other words, it in effect allows a finding of a deficient strategic decision to carry an irrebutable presumption of prejudice. Second, it fails to recognize that even assuming that a presumption of prejudice may arise from a determination of deficient performance, here the presumption was rebutted. It does this by insisting that there were "classic mitigating circumstances," without acknowledging the seriously damaging nature of this evidence.[13]

The panel majority's opinion makes it almost impossible for defense counsel in a death penalty to render effective assistance of counsel. Where, as here, defense counsel recognizes that what might arguably

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[13] As previously noted, we have held that the double-edged nature of arguably mitigating evidence may justify a decision not to present such evidence. *Williams*, 384 F.3d at 619-20.

be mitigating evidence is also damaging, he or she faces an impossible decision. If counsel decides to forego presentation of the evidence, counsel's performance may be subsequently determined to be ineffective because the choice was prejudicial (the client received the death penalty). If defense counsel proffers the controversial evidence, and the client gets the death penalty, counsel will be chastised for introducing evidence that was prejudicial to the client. Moreover, every criminal defendant who persuades a court that his or her counsel was ineffective will argue that if the deficiency was prejudicial in this case, it must be prejudicial in his or her case. Because the panel majority misconceives the Strickland standard for ineffective assistance of counsel and then applies it in such a way as to suggest an irrebutable presumption of prejudice from a counsel's deficient strategic decision, I dissent from our decision not to rehear this matter en banc.

OPINION

THOMAS, Circuit Judge:

Michael Emerson Correll, an Arizona inmate sentenced to death, appeals the district court's denial of his petition for writ of habeas corpus following our remand for an evidentiary hearing. We reverse.

I

This capital case arises under a federal habeas corpus provisions that have been supplanted by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA"), and a state capital sentencing statute that has since been repealed.

The factual history of this case was detailed in our earlier opinion, *Correll v. Stewart*, 137 F.3d 1404, 1408-10 (9th Cir. 1998) ("*Correll I*"). Briefly, Correll was convicted by an Arizona jury in 1984 of first degree murder, attempted first degree murder, kidnapping, armed robbery, and first degree burglary, all for his role in a triple homicide. *Id.* at 1408. He was sentenced to death by the trial judge, *id.* at 1410, and the Arizona Supreme Court upheld his conviction, *State v. Correll*, 148 Ariz. 468, 715 P.2d 721 (Ariz.1986). The Supreme Court, however, modified his death sentence as to one of the victims and invalidated one aggravating factor. *Id.* at 730-31; 734-35.

In 1987, Correll timely filed a petition for post-conviction relief pursuant to Arizona Rule of Criminal Procedure 32. In this petition, Correll asserted multiple violations of his constitutional rights, including his right to the effective assistance of counsel during the guilt and penalty phases of his trial, his right to confrontation, and his right to reliability in capital sentencing. Correll later filed five supplements to his petition, adducing evidence of his mental impairment and his attorney's ineffectiveness. The Arizona trial court summarily dismissed Correll's

petition and subsequently denied Correll's motion for rehearing. The Arizona Supreme Court denied review without comment.

Correll subsequently filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254. Correll alleged fifty-three constitutional violations at trial, at sentencing, and during the appellate process. The district court determined that twenty-six of Correll's claims were procedurally barred, then granted summary judgment against Correll on his remaining constitutional claims.

On appeal, we affirmed all of the district court's order except as to Correll's contention that he was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel at sentencing. *Correll I*, 137 F.3d at 1420. We remanded that issue to the district court with instructions to hold an evidentiary hearing. *Id.*

On remand, the district court conducted a nine day evidentiary hearing. Applying the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and its progeny, the district court concluded that the performance of Correll's attorney at sentencing was deficient but that Correll had suffered no prejudice. The district court therefore granted judgment against Correll on his federal habeas corpus petition. This timely appeal followed.

Because Correll's petition for a writ of habeas corpus was filed before the effective date of AEDPA,

pre-AEDPA law governs our consideration of the merits. *Lindh v. Murphy*, 521 U.S. 320, 327, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1494 (9th Cir. 1997) (en banc). Under pre-AEDPA law, we consider a claim alleging ineffective assistance of counsel as a mixed question of law and fact, which we review *de novo*. *Rios v. Rocha*, 299 F.3d 796, 799 n.4 (9th Cir. 2002). We review the district court's denial of Correll's habeas petition *de novo* and the district court's factual findings for clear error. *Id.*

II

[1] As the Supreme Court has long instructed, the Sixth Amendment right to counsel in a criminal trial includes "the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). This right extends to "all critical stages of the criminal process," *Iowa v. Tovar*, 541 U.S. 77, 80-81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004), including capital sentencing, Silva v. Woodford, 279 F.3d 825, 836 (9th Cir.2002). "Because of the potential consequences of deficient performance during capital sentencing, we must be sure not to apply a more lenient standard of performance to the sentencing phase than we apply to the guilt phase of trial." *Mak v. Blodgett*, 970 F.2d 614, 619 (9th Cir.1992).

Under the familiar Strickland standard, to prevail on his claim of ineffective assistance of counsel during the penalty phase of his trial, Correll must demonstrate first that the performance of his counsel fell below an objective standard of reasonableness at

sentencing and, second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Under Strickland, we measure an attorney's performance against an "objective standard of reasonableness," calibrated by "prevailing professional norms." *Id.* at 688.

There are two aspects of Correll's penalty phase defense that are at issue in this appeal: the investigation of possible defenses and the presentation of valid ones.

A

[2] Counsel has a duty at penalty phase "to conduct a thorough investigation of the defendant's background." *Williams v. Taylor,* 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). "To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[ ] and explain[ ] the significance of all the available [mitigating] evidence.'" *Mayfield v. Woodford,* 270 F.3d 915, 927 (9th Cir.2001) (en banc) (quoting *Williams,* 529 U.S. at 399) (alterations in original). When it comes to the penalty phase of a capital trial, "[i]t is imperative that all relevant mitigating information be unearthed for consideration." *Caro v. Calderon,* 165 F.3d 1223, 1227 (9th Cir.1999), as amended.

The ABA Standards for Criminal Justice provide guidance as to the obligations of criminal defense attorneys in conducting an investigation. *Rompilla v.*

Beard, 545 U.S. 374, 387, 125 S.Ct. 2456, 2466, 162 L.Ed.2d 360 (2005); *Williams*, 529 U.S. at 396. The standards in effect at the time of Correll's capital trial clearly described the criminal defense lawyer's duty to investigate, providing specifically:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

As measured against these prevailing professional norms, there can be little doubt that Correll's penalty phase counsel fell below an objective standard of reasonableness.

[3] First, Correll's attorney did little to counsel Correll about potential mitigating arguments, even though "[a]dequate consultation between attorney and client is an essential element of competent representation of a criminal defendant." *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir.1983) (citation omitted). Correll alleges that defense counsel met with him only once, for five minutes, between trial and

sentencing. *Correll I*, 137 F.3d at 1412. At the evidentiary hearing, his attorney contradicted that allegation, testifying that he met with Correll "[p]robably two or three times." Based on the attorney's testimony, the district court rejected Correll's assertion of minimal consultation, specifically finding that Correll's attorney "did maintain regular contact with Petitioner prior to sentencing."

The record, however, reveals that the district court's finding of adequate consultation was clearly erroneous. Even if counsel's efforts to communicate with Correll exceeded one five-minute meeting, his penalty phase consultation was unreasonably limited. Indeed, Correll's attorney was not even confident that he had met with Correll more than once; he testified, "I know definitely one time that I can recall, but I think probably two or three times." His hand-written notes from the time period confirm only two meetings. More importantly, the attorney's notes make clear that Correll failed to grasp the significance of the sentencing hearing and that his attorney made, at best, minimal efforts to explain it to him. In fact, Correll asked to be sentenced as soon as possible so that he could go to the Department of Corrections in time to pick up a Christmas package, and his attorney acquiesced in that request. At no point did Correll's counsel explain to Correll the possibility of a mitigation defense arising from Correll's drug use, brain damage, family history, or psychiatric record, and at no point did counsel ask Correll for information or contacts specifically related to those issues. We therefore conclude that the district court's factual finding on this issue was clearly erroneous and that the district court's

legal conclusion was in error. Correll's attorney did not maintain constitutionally adequate contact or engage in constitutionally adequate consultation with Correll in between conviction and sentencing.

[4] Second, penalty phase investigations in capital cases should include inquiries into social background, including investigation of any family abuse, mental impairment, physical health history, and substance abuse history. *Summerlin v. Schriro*, 427 F.3d 623, 630 (9th Cir.2005) (en banc). That investigation should include examination of mental and physical health records, school records, and criminal records. *Id.* "Defense counsel should also personally review all evidence that the prosecution plans to introduce in the penalty phase proceedings, including the records pertaining to criminal history and prior convictions." *Id.* (citing *Rompilla*, 125 S.Ct. at 2465). In this case, although defense counsel was aware that potential mitigating evidence existed, he did not explore any avenues that might lead to development of that evidence.

[5] The district court excused defense counsel's failure to investigate many of these mitigating factors on the ground that Correll "had not informed" his attorney of the various "allegations" that amounted to classic mitigating circumstances. On that basis, the district court apparently concluded that defense counsel was unaware of and could not investigate many of the mitigating factors that Correll proffered during the evidentiary hearing. Although the district court was apparently right to conclude that Correll did not specifically inform his counsel of some mitigating

factors, the court's implicit conclusion that the attorney was ignorant of those factors is clearly erroneous. When questioned during the mitigation hearing, Correll's trial counsel explicitly confirmed that he was aware of Correll's mental health disorders, psychiatric commitments, drug abuse history, brain injury, and family dysfunction. Defense counsel testified as follows:

> Q. Were you aware that [Correll] had spent nearly his entire teen life, from ages 14 to 18, as a ward of the State of California and an inmate of the California Youth Authority?
>
> A. Yes.
>
> ...
>
> Q. [T]hese [referring to exhibit] are notes from your first interview and your first meeting with Mr. Correll?
>
> A. Yes.
>
> Q. And you see there noted, don't you, that you learned of mental disorders. You checked the mental disorders box, and that he had been committed twice, and "in joint." Do you see that?
>
> A. Yes.
>
> Q. So you knew from the inception of this case that Mr. Correll had a couple of commitments to

psychiatric or mental institutions?

[Objection colloquy omitted.]

THE WITNESS: Yes, I definitely knew that.

[Colloquy omitted.]

Q. You also learned, during the course of your representation of Mr. Correll, that he had a rather lengthy drug abuse history, didn't you?

A. Yes.

Q. Did you also learn, during the course of your representation, that other of the Correll brothers had criminal records and themselves had been incarcerated in the Youth Authority?

A. Yes.

Q. Did you learn that his sister Robin was residing in a foster home?

A. I believe I was aware of that. I don't recall at this point.

Q. Did you then, conclude that there were problems of some description within the Correll household that may have contributed to the Correll childrens' [sic] poor record of success?

A. Oh, it was obviously an extremely dysfunctional family.

This testimony makes perfectly clear that Correll's trial counsel was aware of many if not all relevant mitigating factors. The district court's implicit conclusion to the contrary was clearly erroneous.

Indeed, in light of the abundance of classic mitigation evidence of which counsel was aware, his almost complete failure to investigate is startling. Despite his knowledge that Correll was a drug user with an extremely troubled childhood, defense counsel did not interview witnesses about these issues or obtain records concerning these matters. The district court found that Correll's attorney "interviewed or tried to interview" about forty or fifty witnesses but that "[t]he witnesses were not able to provide relevant useful mitigation information." On that basis, the district court found that counsel's investigative efforts, at least with respect to the interviews, were adequate. Once again, the district court's factual finding and legal conclusion are clearly erroneous.

Admittedly, counsel did meet with some witnesses during the trial phase, including those members of Correll's family who would cooperate. But counsel testified that he met only once with Correll's father, sister, and brother, "around the kitchen table at the same time," and probably spent only "[a] couple hours" with them. Furthermore, Correll's counsel admitted that he interviewed witnesses only during the guilt phase, not during the sentencing phase. Although the attorney testified that he was looking for mitigation information as well as exculpatory information during those pre-trial interviews, he failed

to ask any direct questions or to conduct any direct investigation related to the mitigating factors that are now at issue. When counsel was asked at the evidentiary hearing whether he had questioned the interviewees about Correll's drug abuse, head injury, psychiatric history, or family dysfunction, counsel testified that he asked no such specific questions but, rather, asked the interviewees simply to "tell [him] anything [they could] tell [him] that would help." As a result, counsel's interviews were substantively worthless. Thus, his failure to gather mitigating information did not result from its unavailability; it resulted from counsel's complete failure to ask any relevant questions. The district court's conclusion to the contrary was clearly erroneous.

Additionally, trial counsel did not obtain records from Correll's schools or from psychiatric institutions, even though counsel admitted that those records may have contained mitigating evidence. Counsel also failed to obtain police reports on prior convictions and records regarding the time that Correll was in the custody of the California Youth Authority. Counsel did not obtain Correll's medical records, and he made no inquiry into whether an X-ray or other diagnostic test was performed to determine whether Correll suffered any brain injury following an incident in which a wall fell on Correll's head.

During the evidentiary hearing, counsel could not recall what efforts he made to gather Correll's psychiatric records, though he did remember that he

failed to obtain records from Correll's stays at various mental health centers.[1] As the district court correctly concluded, counsel's failure to obtain these relevant records constituted deficient performance.

In sum, defense counsel's investigation into classic mitigators was extremely limited. Two of the district court's conclusions were clearly erroneous: that counsel was unaware of some mitigators and that counsel conducted sufficient interviews to investigate the mitigators of which he was aware. The district court correctly concluded that counsel failed to obtain relevant records that were available at the time. Taken together, this evidence demonstrates that counsel's investigation into classic mitigators was unreasonably limited-that counsel's penalty phase representation was constitutionally inadequate.

Of course, Correll's attorney was not wholly without a mitigation strategy. But the limited strategy that he developed was unreasonably constricted, and even with respect to that anemic strategy, counsel's investigative efforts were unreasonably weak.

Defense counsel testified that the principal mitigation evidence he sought was information that would show Correll as a "good person" and one who had "done good deeds." Such a limitation on the scope of the mitigation investigation was, in and of itself, unreasonable given the extreme unlikelihood that any

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[1] As the district court found, some of these records were destroyed between the time of the trial and the time of the habeas investigation.

testimony about Correll's character would have been sufficient to "humanize [ ] him during the time frame of the murder conspiracy at issue." *Allen v. Woodford*, 366 F.3d 823, 851 (9th Cir.2004). Rather, as Correll's attorney knew at the time, the most likely type of evidence available was the type that would portray Correll as a "person whose moral sense was warped by abuse, drugs, [or] mental incapacity." *Id.*

Even assuming, however, that reliance on a character defense was a reasonable strategy in this case, counsel's investigation into character evidence was inadequate. For example, Correll's attorney was aware that a chaplain with the California Youth Authority, Reverend Curry, might have been willing to testify on Correll's behalf, but the attorney never even attempted to contact Reverend Curry.[2]

[6] Based on the foregoing, we conclude that Correll's counsel provided constitutionally deficient representation during his investigation into possible mitigation defenses. The district court was correct in its limited holding that defense counsel failed to seek

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[2]The district court concluded that this failure was not prejudicial because Reverend Curry's employer did not permit him to testify on Correll's behalf. The district court, however, completely misunderstood Reverend Curry's testimony. The California Youth Authority prohibited Reverend Curry from initiating contact with Correll's attorney, but it did not prohibit him from appearing on Correll's behalf at the hearing. Reverend Curry testified repeatedly that he would have been happy to speak on Correll's behalf if Correll's attorney had initiated contact (which, again, he never did).

and obtain mental health and other medical records, and we further conclude that the rest of defense counsel's investigative efforts, including his contact and consultation with Correll, his interviews with relevant witnesses, and his development of a character-based mitigation strategy, were also constitutionally inadequate. Defense counsel's failure to investigate falls far short of any objective standard against which we might measure reasonable attorney performance under the Sixth Amendment.

B

Compounding his errors during the investigative phase of sentencing, Correll's attorney then presented to the court virtually none of the little mitigating evidence that he had developed. "There is no more important hearing in law or equity than the penalty phase of a capital trial." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1050 (9th Cir.1997) (Reinhardt, J., concurring and dissenting). At the penalty phase, a capital defendant has a "constitutionally protected right [ ] to provide the jury with ... mitigating evidence." *Williams*, 529 U.S. at 393. "Failure to present mitigating evidence at the penalty phase of a capital case constitutes ineffective assistance of counsel." *Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir.1998).

[7] As anemic as the defense counsel's investigation was, his presentation of mitigating evidence at the penalty phase was worse. In fact, defense counsel put on no affirmative penalty phase defense whatsoever. He did not call a single witness to testify. He did not introduce any evidence. The state

trial court record states: "Defendant waives presentation of mitigating evidence."

Indeed, the only proactive effort that Correll's attorney made at sentencing was to write a short response to the presentence report. In that written submission, he included a list of mitigating arguments, but he did not support those arguments with any evidence, affidavits, or testimony. The entirety of the written submission in mitigation reads as follows:

> A. Defendant was under the influence of alcohol and drugs at the time the offenses were committed.
>
> Guy Snelling stated in an interview with police officers on April 12, 1984, that there was alcohol on the breath of Defendant at the time the offenses were committed. It is obvious from this and the conduct of the perpetrators, that they were under the influence of alcohol or drugs or both at the time the offenses were committed.
>
> B. Defendant was only a follower in the commission of the crimes.
>
> Guy Snelling stated in an interview with defense counsel on August 14, 1984 that it was clear that John Nabors was the leader of the two perpetrators and was making the decisions. This is further corroborated by the fact that it was John Nabors who knew Guy Snelling would have illicit drugs and money

and therefore, John Nabors must have done the planning of the robbery.

C. Prior to the robbery, there was no reason to believe that anyone would be present other than Guy Snelling, and therefore, there was no prior plan to kill Debra Rosen, Robin Cady or Shawn Di'Brito.

D. Defendant has cooperated with the Adult Probation Office in the preparation of his presentence report.

E. Defendant's age.

Predictably, the Arizona Supreme Court and the federal district court concluded that this mitigation argument was not sufficiently significant to call for leniency.

[8] The anemia of counsel's mitigation presentation was a critical error, certainly rising to the level of constitutionally deficient representation. "The failure to present mitigating evidence during the penalty phase of a capital case, where there are no tactical considerations involved, constitutes deficient performance, since competent counsel would have made an effective case for mitigation." *Smith v. Stewart*, 189 F.3d 1004, 1008-09 (9th Cir .1999).

[9] The error's full magnitude, however, does not become apparent until we consider the effect it had under Arizona law in particular. At the time of the penalty phase proceedings, Arizona law mandated the

death penalty if the trial judge found any one of the enumerated aggravating factors and determined that there were no mitigating factors that were sufficiently substantial to call for leniency. Ariz. Rev. Stat. § 13-703 (1984). One of the enumerated aggravating circumstances is a previous violent felony, for which Correll unquestionably qualified. *State v. Correll*, 715 P.2d at 731. In Correll's case, therefore, the failure to present any evidence in mitigation "all but assured the imposition of a death sentence under Arizona law." *Summerlin*, 427 F.3d at 640; *see also Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir.1988) (noting that in Arizona, once an aggravating circumstance like a prior aggravated felony was found, death was inevitable without mitigating evidence, and thus holding that the failure to pursue psychiatric evidence constituted prejudicially deficient performance).

In fact, the State argued five aggravating factors, and Correll's defense counsel disputed only a few of them. He disputed that the crimes were cruel, heinous, and depraved, and he argued that convictions for more than one homicide could not be used as an aggravating factor because the statute authorizing this factor was not in effect on the offense date. At the evidentiary hearing in the district court, he conceded that he thought "it was a veritable certainty" that the court would find "at least two, and probably all five of [the] aggravating factors." The court found four.

Defense counsel's sentencing memo does not even attempt to rebut three of the five aggravating factors urged by the State. In his oral presentation at sentencing, counsel mentioned the aggravating factors,

but in form only, without any substantial legal position or evidentiary support. The entirety of his oral argument at the penalty phase consists of approximately 7 pages of transcript.

Given counsel's virtual concession of most of the aggravating factors argued by the State and his waiver of the presentation of mitigation evidence, the outcome was obvious: imposition of the death penalty. The Arizona Supreme Court, in re-weighing the aggravating and mitigating factors, found no mitigating factors "sufficiently substantial to call for leniency." *State v. Correll*, 715 P.2d at 735. The Court highlighted the lack of evidence presented in mitigation and noted that the "defendant has offered no evidence or expert testimony on which we could base a finding that he was unable to appreciate the wrongfulness of his conduct." *Id.* The Court was particularly dismissive of his attempt to count cooperation in the pre-sentence investigation as a mitigating factor, noting "[i]t is in defendant's interest to cooperate at sentencing; defendant should not be rewarded for self-serving acts." *Id.*

[10] In sum, Correll's counsel was constitutionally deficient in failing to investigate and present mitigating evidence. Particularly in light of Arizona's death penalty regime, the failure to develop a robust mitigation defense-and the failure to defend against the State's aggravation case-was unreasonable, falling below any objective standard of adequate representation.

C

The State contends that the failure to put on penalty phase evidence was a strategic choice, protected under *Strickland*. To be sure, under *Strickland*, we must defer to trial counsel's strategic decisions. "A reasonable tactical choice based on an adequate inquiry is immune from attack under *Strickland*." *Gerlaugh*, 129 F.3d at 1033. However, to be considered a constitutionally adequate strategic choice, the decision must have been made after counsel has conducted "reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In addition, "[e]ven if [a] decision could be considered one of strategy, that does not render it immune from attack-it must be a reasonable strategy." *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir.1997) (emphasis in original). In this case, because of defense counsel's failure to investigate potential mitigation evidence, he had too little information to make any informed strategic decision. Furthermore, when considered objectively, his purported "strategy" cannot be considered reasonable.

1

[11] A decision by counsel not to present mitigating evidence cannot be excused as a strategic decision unless it is supported by reasonable investigations. *See Williams*, 529 U.S. at 394 (recognizing a constitutional right to present mitigating evidence to the jury); *Silva*, 279 F.3d at 843 (recognizing "the breadth of a criminal defendant's constitutional protection against his attorney's failure to investigate mitigating evidence when defending his

client against a capital sentence"). In *Wiggins*, the Supreme Court held that the traditional deference owed to the strategic judgments of counsel is not justified where there was not an adequate investigation "supporting those judgments." 539 U.S. at 521.

Here, as we have discussed, defense counsel failed to make a reasonable investigation into potential mitigating evidence. Therefore, his decision not to put on a mitigation case cannot be considered to be the product of a strategic choice. An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all. *Cf. Strickland*, 466 U.S. at 690-91 (holding that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation").

In *Silva*, for example, we held that in the absence of diligent investigation, counsel cannot make a reasoned tactical decision regarding whether or not to present mitigating evidence. 279 F.3d 846-47. Indeed, we determined that even if a client forecloses certain types of mitigation evidence, "it arguably becomes even more incumbent upon trial counsel to seek out and find alternative sources of [mitigating evidence]." *Id.*

[12] Here, an abundance of classic mitigation evidence existed. However, counsel failed to investigate these potential avenues and was therefore unable to make an informed decision as to whether to present the evidence and arguments that were available. His

choice not to present mitigation evidence, therefore, cannot be justified as strategic.

2

To the extent that there was any strategy involved in the penalty phase presentation, it cannot be considered a reasonable strategy by any objective measure.

Defense counsel chose to rely on the pre-sentence report prepared by a state probation officer, despite his own characterization of that report as "one-sided." During his short sentencing argument, defense counsel criticized the author of the pre-sentence report for failing to interview several people who could have provided mitigating statements. The irony, of course, is that defense counsel could have introduced during the penalty phase the very mitigating evidence that he felt the probation officer should have gathered.

The sentencing report described the crimes as "particularly heinous" and speculated that "the murder scene in the desert must have been particularly gruesome." The probation officer concluded that, given the circumstances of the crime, "[t]hey obviously planned the murders ahead of time and then calculatingly and unemotionally carried out their plans." The pre-sentence report described Correll's history as "a text book of psychopathology," and "riddled with instances of violent behavior and armed aggression." The probation officer determined that Correll "was not capable of functioning in society." The report concluded with the observation that "[h]e is a

threat, a menace, and in my opinion, the community at large should never again be subjected to the risk of recurrence of this type of behavior." These statements are hardly the words of mitigation, and no competent capital defense counsel would have relied upon such a report as providing mitigation evidence, much less as the sole source of mitigation evidence.

[13] Defense counsel testified at the evidentiary hearing that he "was basically hoping [the judge] would think it was a one-time incident and want to give Mr. Correll a break and find a mitigating factor." However, the pre-sentence report contained explicit references to an extensive criminal history that belied this theory. Indeed, the page and a half of criminal convictions reported is longer than defense counsel's entire mitigation presentation in his sentencing memorandum. It was not a reasonable strategy to rely on the pre-sentence report to prove that the crime was a "one-time incident" when the entire report drew the opposite conclusion.

When asked at the evidentiary hearing, "what was your sentencing strategy," trial counsel responded that it was "hoping that [the judge] liked Mr. Correll" and hoping that the judge found that the crime "was a drug ripoff that went bad[,] that Michael was under the influence," and that "he wasn't the leader in the crimes." When pressed, however, defense counsel was forced to admit that portraying the crime as a onetime drug ripoff gone bad was not something that would constitute a mitigating factor.

Throughout the evidentiary hearing, defense

counsel revealed a fundamental misconception of mitigation evidence. He referred to the sentencing hearing as "a dog and pony show" and "so much smoke." He said he felt that the judge would not have been receptive to mitigation evidence that was "touchy-feelly [sic] fuzzy-headed kind of stuff." When asked about the classic mitigation evidence that was available, such as potential brain injury,[3] a history of drug addiction, and abuse suffered as a child, counsel testified that he didn't think of the evidence as favorable evidence. However, it is precisely this type of evidence that the Supreme Court has deemed "powerful." *Wiggins*, 539 U.S. at 534.

It appears clear from examination of his testimony that defense counsel was afraid of the sentencing judge. In fact, he forewent psychological testing because he feared that the judge would learn of it, and he testified that he might have presented evidence of Correll's history of drug addiction had he been before a different judge.[4] He believed that the

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[3] As the district court noted, the Arizona Courts place significant weight on brain injuries as mitigating evidence. Similarly, "[w]e have repeatedly held that counsel may render ineffective assistance if he is on notice that his client may be mentally impaired, yet fails to investigate his client's mental condition as a mitigating factor in a penalty phase hearing." *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir.2002) (internal quotations omitted).

[4] The dissent characterizes this decision not to present psychological evidence as strategic because it would "make it easier for the judge to sentence Correll to death because it would cause him to view Correll as permanently psychologically damaged." However, counsel's failure to investigate Correll's psychological history for fear of the trial judge cannot be termed

(Continued)

judge would use mitigating evidence as an aggravating factor, in violation of the mandatory language of Ariz.Rev.Stat. § 13-703(E). When asked in a pre-hearing interview about his decision not to introduce evidence of Correll's psychological disorders, counsel responded:

> [A]s a practical matter, and certainly with Judge Howe [the trial judge], once he found out that this man was a sociopath or psychopath, whichever term you want to use, he didn't have a chance in a hundred of keeping from getting the death penalty. 'Cause even though he can claim that this is a mitigating factor the reality is that when you tell someone in society and certainly Judge Howe, the man is a sociopath, that dictates that he's the kind of person who should get the death penalty, that's what the thinking's going to be.

This entire line of reasoning, however, presumes that the judge would not follow the law[5]—speculation

(Continued).

"strategic." Counsel worried that the trial judge would presume that any psychological evaluation portrayed Correll in a negative light if he granted a contact visit order for such an evaluation and the results were never submitted to the court. This fear presumes that the trial judge would act inappropriately by considering evidence outside of the record in making his sentencing decision, and it fails to recognize the importance of creating a record for review, even if the trial judge likely would be unsympathetic. Psychological injury is the type of evidence the Supreme Court has viewed as classic mitigating evidence. *Wiggins*, 539 U.S. at 534.

[5] *See State v. Vickers*, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981) (holding that personality disorders, while they do not qualify as statutory mitigators, must be considered as potential mitigators, particularly where there is (Continued)

that is never appropriate and that is not supported by the record here.

Fear of a particular sentencing judge's reaction also ignores the fact that, in capital cases, the Arizona Supreme Court conducts an independent review of the aggravating and mitigating factors, re-weighing them afresh. *See State v. Johnson*, 147 Ariz. 395, 710 P.2d 1050, 1055 (Ariz.1985) ("Whenever the trial court imposes the death sentence we must conduct an independent review of the facts that established the aggravating and mitigating circumstances in order to determine for ourselves if the latter outweigh the former and justify the sentence."); *see also State v. Richmond*, 114 Ariz. 186, 560 P.2d 41, 51 (Ariz.1976) ("[T]he gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed."). At the time of Correll's appeal, the Arizona Supreme Court was also required to conduct an independent proportionality review. *State v. Correll*, 715 P.2d at 737-38. Therefore, even if defense counsel's fears about the judge were legitimate, there is no strategic excuse for failing to put on evidence in support of statutory mitigating factors that the Arizona Supreme Court could have considered in its independent re-weighing of aggravating and mitigating factors.

[14] In short, to the extent that defense counsel had a strategy at all, it cannot be considered an objectively reasonable strategy.

(Continued).

evidence that the personality disorder influenced the defendant's behavior).

3

Counsel's ineffective assistance at sentencing cannot be excused as strategic. He failed to conduct an investigation sufficient to make an informed judgment. To the extent that his decisions reflected any tactical considerations, his approach of not putting on a mitigation case cannot be considered an objectively reasonable strategy, even when viewed under the highly deferential *Strickland* standard.

III

[15] It is, of course, not enough for Correll to establish that his counsel's performance at sentencing fell below an objective standard of reasonableness. He must also "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to "undermine confidence in the outcome." Id.

In considering this question, we have recognized that deficient performance and prejudice questions may be closely related. *See Summerlin*, 427 F.3d at 643 ("[W]e conclude that the failure of trial counsel to investigate, develop, and present mitigating evidence at the penalty phase hearing has undermined our confidence in the sentence of death imposed by the trial judge."); *Smith*, 189 F.3d at 1011 ("Because of [counsel's] failure to provide competent representation, our confidence in the outcome of Smith's sentencing

has been undermined."). In establishing prejudice under Strickland, it is not necessary for the habeas petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome the aggravating circumstances. *Williams*, 529 U.S. at 398. Accordingly, even where the facts discovered on habeas review do not rise to the level of statutory mitigation, we have held that a reasonable probability existed that this information could have affected the sentence. *Smith*, 140 F.3d at 1270; *see also Rompilla*, 125 S.Ct. at 2469 (noting that "although we suppose that [the sentencer] could have heard it all and still have decided on the death penalty, that is not the test").

Here, there was a substantial amount of classic mitigating evidence that could have been presented, but was not.

Correll had endured an abusive childhood. His mother was a Jehovah's Witness, whose commitment to her church came before her commitment to her family. She spent most of her time with the church, often neglecting her six children's basic needs. The children were required to attend adult bible study class with her three nights a week, for three hours per night. If they misbehaved or indicated that they were confused or did not understand the religious doctrine, they were punished. Correll's father was largely absent but sometimes aided his wife in physically punishing their children. There was evidence of incest in the family.

When Correl was seven, a brick wall collapsed on his head. Although he was unconscious for some

time after the accident, his parents did not seek medical treatment until several days later when he was still not back to normal. Several experts testified that this type of accident and the symptoms Correll exhibited then and now indicate a high likelihood of brain impairment.[6]

Against this backdrop, Correll began experimenting with alcohol and drugs around age ten. He was using marijuana, LSD, and amphetamines regularly by age twelve, behavior that can be characterized as self-medication for the everyday trauma of his life and for the mental health illnesses that were later diagnosed when he became a ward of the state.

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[6] The district court dismissed evidence of Correll's brain injury, concluding that any organic brain injury played no role in Correll's crimes. The district court's conclusion was based on the judge's own evaluation of two conflicting experts. But in the procedural context of this case, the district court's role was not to evaluate the evidence in order to reach a conclusive opinion as to Correll's brain injury (or lack thereof). The district court should have decided only whether there existed a "reasonable probability" that "an objective fact-finder" in a state sentencing hearing would have concluded, based on the evidence presented, that Correll had a brain injury that impaired his judgment at the time of the crimes. *Summerlin*, 427 F.3d at 643. Because the competing neuropsychologists who testified at the evidentiary hearing agreed that the evidence of brain injury was at least strong enough to deserve presentation at a sentencing hearing, we conclude that Correll's evidence had at least a "reasonable probability" of persuading an objective fact-finder. The district court clearly erred when it concluded that Correll presented insufficient evidence of organic brain damage.

It is notable that each of the six Correll children reported that they had or have had substance abuse problems beginning in childhood or adolescence. Further, at least five of the six children spent time in juvenile correctional facilities, and all four of the boys in the family have spent time in adult correctional facilities.

In response to Correll's obvious substance abuse problems, his parents intervened with beatings and threats of kicking him out of the house. Further, the state failed to recommend drug or alcohol treatment despite Correll's frequent contact with the juvenile authorities.

After Correll was shot in the arm at age 14, the hospital asked his parents to let him come home. They allowed him to recuperate at home for three or four days before asking the state to sever their parental rights. At that time, they cut off all communication with their son and considered him dead, as required by their church's teachings.

Correll became a ward of the state at age 14 and spent his teenage years in various state institutions described as "gladiator schools," which were characterized as cruel and inhumane, even by those who worked there. He was placed in programs for low-performing students, which were referenced as "dummy shacks." Within months of becoming a ward of the state, 14-year-old Correll became addicted to heroin.

Correll was committed to psychiatric

institutions at least twice during his teen years and was described at age 16 as "severely psychologically impaired." He was treated with a tranquilizer/anti-psychotic drug while institutionalized, and he attempted suicide on two occasions. However, there is no evidence that Correll continued to receive treatment after these stays.

Methamphetamine eventually became Correll's drug of choice, which he used whenever he could. Correll offered expert testimony during the evidentiary hearing of the effect of high methamphetamine use, including brain damage, blackouts, and methamphetamine-induced psychosis, all of which may be compounded by sleep deprivation.

At the time of the murders, Correll was injecting a quarter gram to a gram of methamphetamine in one shot, and he was injecting three to four shots a day. According to expert testimony at the evidentiary hearing, Correll was in the top 1% of methamphetamine users in terms of quantity. During the period of time in which the crimes were committed, Correll's typical pattern was to go seven to ten days without sleep, followed by one to two days of continuous sleep. He was observed injecting methamphetamine shortly before the crimes were committed. Expert testimony indicated that he was likely having impulse control problems, judgment impairment, and aggressiveness at the time of the crime and that he may have been experiencing drug-

induced paranoia.[7]

In sum, there was a substantial amount of mitigating evidence available,[8] which, taken together, is sufficient to raise a presumption of prejudice under the Supreme Court's standard in *Wiggins*, 539 U.S. at 534-38.

But we need not rest on presumption. All of the available evidence constituted classic mitigation evidence that certainly had the potential to persuade

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[7] The district court discounted much of this evidence on the ground that it was based on Correll's self-reported drug habits, which the court concluded were not credible. The conclusion that Correll's reports were not credible, however, is clearly erroneous in light of the substantial corroborating evidence introduced at the evidentiary hearing. Two witnesses, Dawn Day and Reverend Curry, testified as to their own observations of Correll's drug habits, and their observations fully comported with Correll's self reports. Medical and prison records indicated that Correll had issued identical self reports at times when he had no incentive to exaggerate the extent of his drug abuse. Furthermore, Correll's reports of his drug use have never varied, over the course of several decades. In short, there was no reason for the district court to doubt the veracity of Correll's self reports. On the contrary, there was significant evidence tending to corroborate Correll's account, including several records showing consistency over time of Correll's story.

[8] The government argues that much of this evidence was already before the sentencing court in the pre-sentence report. While the bare facts of Correll's troubled past were indeed presented to the court, without further investigation and presentation of contextual evidence and argument, such facts served only to demonize Correll rather than to mitigate the appropriateness of imposing the death penalty for his actions.

"an objective fact-finder" that Correll was, at the time of the crimes, incapable of appreciating the wrongfulness of his conduct. *Summerlin*, 427 F.3d at 643. To use the Supreme Court's words, "[h]ad[a] jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

[16] Indeed, in this case, the evidence of Correll's "excruciating" history could have provided an alternative-and much more sympathetic-context for the horrific observations and conclusions that were before the judge in the presentence report. While the presentence report characterized Correll as a "threat" and a "menace," the evidence of Correll's family history, personality disorder, and brain injury could have colored Correll as an organically diseased and injured person who, through no fault of his own, lacks the ability to comprehend the immorality of his conduct. Correll's full history also had the potential to convince an objective fact-finder that his criminal behavior has, throughout his life, been his means of gaining the negative and destructive attention that he was taught to seek from a very young age. As the Supreme Court has consistently instructed, these kinds of claims constitute classic mitigation, which a fact-finder must consider when deciding between life imprisonment and death.

Perhaps more compellingly, the evidence of Correll's methamphetamine use on the night of the crimes, had it been fully presented, could have risen to

the level of a statutory mitigator. Under Arizona law, gross intoxication at the time of the crime constitutes a statutory mitigator if that intoxication impaired the defendant's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." A.R.S. § 13-703(G)(1). There was undisputed evidence adduced at the evidentiary hearing that Correll was addicted to methamphetamine, that Correll used some methamphetamine on the day of the crime, that Correll habitually used methamphetamine in astonishingly and unusually high dosages, and that drug addicts generally are incapable of using their drug of choice in any dosage that is lower than their usual dosage. Thus, the evidence strongly indicated that Correll used an extremely high dosage of methamphetamine on the day of the crime.

The district court, however, concluded that there was no evidence of gross intoxication at the time of the crimes because certain witnesses indicated that Correll was oriented during the commission of the crimes. This conclusion rests on a critical misunderstanding of the evidence.

At the evidentiary hearing, expert testimony made it clear that gross methamphetamine intoxication, unlike gross alcohol intoxication, is not necessarily apparent to outside observers. The experts described a state known as "methamphetamine blackout," during which the user would be capable of performing complex tasks but would be incapable of understanding or remembering his behavior. One of the experts, a recovered methamphetamine addict,

specifically confirmed the possibility that "those observing a person in a methamphetamine blackout [wouldn't] know that the person is in a methamphetamine blackout." This evidence severely undermines the propriety of the district court's reliance on witness observation in concluding that Correll was not intoxicated on the night of the crimes. Those witnesses might not have known whether Correll was intoxicated or not.

Furthermore, the experts also testified that gross methamphetamine intoxication impairs a person's inhibition and judgment, rendering the intoxicated person incapable of measuring and understanding the consequences of his actions. A person in a methamphetamine blackout, the experts implied, would not be capable of understanding the "wrongfulness of his conduct."

[17] Thus, the district court was clearly wrong to conclude that there was no available evidence that Correll was grossly intoxicated—to the point of being unable "to appreciate the wrongfulness of his conduct"—on the night of the crime. Expert testimony at the evidentiary hearing clearly established that methamphetamine use, in the quantities that Correll undisputably used the drug on a regular basis, would significantly impair judgment and consciousness without causing perceptible symptoms of intoxication. We conclude that this evidence—had it been developed and presented—could reasonably be expected to persuade an objective fact-finder that Correll was incapable of understanding the wrongfulness of his conduct on the night of the murders.

The dissent argues that Correll was not prejudiced by the failure to investigate and present mitigation evidence and argument because the presentation of such evidence and argument "would have enabled the prosecution to present very damaging evidence in rebuttal." However, a significant portion of that damaging rebuttal evidence was already available through the pre-sentence report. For example, the "numerous escapes from mental health treatment facilities" and the "hostage taking and armed aggression against mental health workers" were both clearly delineated in the pre-sentence report.

Furthermore, *all* of the so-called "damaging rebuttal evidence" could, in the hands of a competent attorney, have been used to support Correll's claims of dysfunctional upbringing and continuing mental disorder. For example, Correll's statement that he felt "a strong sense of power and excitement" when he committed armed robbery could show either that Correll is dangerous—as the presentence report concluded—or that Correll has a diseased perception of social interaction, which prevents him from conforming his conduct to the law. Indeed, all of the facts on which the dissent relies could be either dehumanizing or mitigating, depending on the context and history given for each cited fact.[9]

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[9] That some of the defense witnesses at sentencing might have presented inculpatory testimony is not particularly significant, given that counsel had abandoned at sentencing any claims of actual innocence or misidentification.

In view of the record developed at the evidentiary hearing, we conclude that there is a reasonable probability that the outcome of Correll's sentencing would have been different had he received competent representation. This was an unusual case in the capital context because it involved a defendant who had not killed any of the victims, although he certainly attempted to kill one person who fortunately survived. The actual murders were committed by another person. The failure to present a mitigation case was particularly indefensible under Arizona law that existed at the time, which required the imposition of the death penalty absent a case in mitigation. Given all of these factors, there is a significant possibility that the introduction of *some* mitigating evidence could have spared Correll's life.

IV

[18] Correll was constitutionally entitled to the presentation of a mitigation defense. He did not receive one, although substantial mitigation evidence existed. Most importantly, because Arizona law required the imposition of a death sentence if aggravating factors were proven and no mitigating factors presented, the failure to present any mitigation defense constituted ineffective assistance of counsel under the standards set forth in *Strickland*. The fear of a trial judge cannot be considered strategic justification for forgoing the presentation of a mitigation defense, particularly given that (1) Arizona law required imposition of the death penalty when no mitigating factors were found, and (2) the Arizona Supreme Court was required to re-weigh the aggravating and mitigating factors. Furthermore,

the evidence adduced at the evidentiary hearing revealed several classic mitigators that a reasonable attorney could have used to contextualize Correll's violent past and to mitigate Correll's current culpability.

[19] We conclude the Correll is entitled to relief in the form of a new penalty phase trial. We reverse the judgment of the district court and remand with instructions to issue a writ of habeas corpus.

REVERSED.

O'SCANNLAIN, Circuit Judge, dissenting:

I respectfully dissent from the court's conclusion that Correll has met the "highly demanding and heavy burden of establishing actual prejudice" in the pursuit of his claim of ineffective assistance of counsel during the penalty phase of the trial. *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir.2005) (quoting *Williams v. Taylor*, 529 U.S. 362, 394 (2000)) (internal quotation marks omitted). The majority ignores the mountain of precedent which requires us, in assessing prejudice, to consider not only the likely benefits of the mitigating evidence Correll's counsel failed to present, but also its likely drawbacks. In addition, the majority substitutes its independent analysis of the record for that of the district court, relying on its own view of the evidence rather than considering, as we must, the effect the evidence would have had on an Arizona sentencing judge 23 years ago. Because I do not believe that Correll has met his burden "affirmatively [to] prove

prejudice," I would affirm the judgment of the district court denying the petition for writ of habeas corpus. *See Strickland v. Washington*, 466 U.S. 668, 693 (1984).

I

The facts of Correll's brutal crimes are disturbing, but must be recounted to illustrate the unlikelihood that Correll's new evidence would have convinced the sentencing judge not to impose the death penalty.[10]

A

On the night of April 11, 1984, as Guy Snelling and his girlfriend Debra Rosen were getting ready to go to sleep, a knock came at the door. Snelling answered the door and found John Nabors, his co-worker, and Correll, whom he had not met.

After Snelling let the two men into his home, Nabors pulled a gun and demanded money. Correll secured Snelling and Rosen with duct tape. When Robin Cady and Shawn D'Britro, two friends of Snelling, unwittingly arrived at the house, Correll secured them with duct tape as well. Then Correll and Nabors escorted Snelling throughout his home to

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[10] Although it is normally not necessary to restate the facts and procedural history in a dissenting opinion, the reader will understand that this exercise is necessary due to the sharp divergence between the majority's presentation of the facts and the district court's factual findings.

search for money and valuables.

After raiding the house for approximately 45 minutes, Nabors and Correll exited with Cady, D'Brito, and Snelling, whom they forced into Cady's car. Nabors briefly went back inside to secure Rosen. While holding the gun on the three victims, Correll drove to a deserted area where Nabors's truck was parked. Nabors took his truck and followed Correll, who was still driving Cady's car with the three victims, to a desert area north of Phoenix. There, they forced the three victims out of the car and made them lie face down on the ground. Correll shot Snelling in the back of the head. Nabors then shot and killed D'Britro, and then tried to shoot Cady. The gun misfired a couple of times and Correll said "hurry up, hurry up, ... okay, it's cool, no cars coming, get a shell chambered." After reloading the gun, Nabors was finally successful in shooting and killing Cady. After Correll and Nabors left, Snelling, who miraculously did not die, reported the crime. Rosen, whom Nabors and Correll had left in the house when they drove the other three victims into the desert, was later found in the house, killed by strangulation.

B

At trial, Correll's sole defense was misidentification-namely, that Snelling, who was under the influence of drugs and alcohol when the crimes occurred, had wrongly identified Correll as one of his assailants, and that it was reasonably likely that Correll's brother Terry, who resembled Correll, had committed the crimes instead. Unpersuaded by this

defense, a jury convicted Correll of three counts of first degree murder, one count of attempted first degree murder, one count of armed robbery, one count of first degree burglary, and four counts of kidnaping.

At sentencing, the government urged the court to impose the death penalty. The government asserted that five statutory aggravating factors were present: (1) a previous violent felony conviction;[11] (2) grave risk of death to others in addition to the persons murdered;[12] (3) commission of the murders in anticipation of pecuniary gain;[13] (4) commission of the murders in an especially heinous, cruel or depraved manner;[14] and (5) convictions for multiple murders during the offense.[15]

In response, Correll's attorney argued that the prosecution had failed to prove, as required by *Enmund v. Florida*, 458 U.S. 782 (1982), that Correll intended to kill Rosen, Cady, and D'Brito. Although the sentencing court did not accept this argument, Correll's attorney preserved it for appeal and the Arizona Supreme Court later modified one of Correll's death sentences to life imprisonment on this ground. *See State v. Correll*, 715 P.2d 721, 730-31 (Ariz.1986). Correll's attorney also countered each of the

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[11] Ariz. Rev. Stat. § 13-703(F)(2)
[12] *Id.* § 13-703(F)(3).
[13] *Id.* § 13-703(F)(5).
[14] *Id.* § 13-703(F)(6).
[15] *Id.* § 13-703(F)(8).

government's proffered aggravating factors.[16] He argued-and the sentencing court agreed-that the "grave risk of death to others" aggravating factor did not apply. He also argued that the multiple murder aggravating factor could not be considered. Although the sentencing court did not accept this argument, Correll's attorney preserved it for appeal and the Arizona Supreme Court later invalidated this aggravating factor. *See id.* at 734-35. Correll's attorney further argued, unsuccessfully, that the evidence did not support the remaining aggravating factors.

In addition to challenging the government's aggravating factors, Correll's attorney also presented substantial mitigating evidence.[17] First, counsel

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[16] The majority unduly discounts defense counsel's attack of the government's asserted aggravating factors. See Maj. Op. at 5450-51. Both the Arizona Supreme Court and the state trial court disagreed with the majority's assessment of counsel's performance with respect to the "grave risk of death to others" and the "multiple murders" aggravating factors, agreeing with counsel's assertion that the first factor was unsupported and the second was unconstitutional in this case. The Arizona Supreme Court also found persuasive defense counsel's argument that the government failed to prove beyond a reasonable doubt that Correll intended to kill one victim and therefore the death penalty could not be imposed on that count. Furthermore, counsel made compelling substantive legal and factual arguments with respect to the other aggravating factors.

[17] The majority quotes the state trial court record, which reads that "Defendant waive[d] presentation of mitigating evidence." Maj. Op. at 5447. This excerpt, however, was merely the conclusion of the court clerk. In the district court proceedings, defense counsel adamantly maintained that "[w]e didn't waive" the presentation of mitigating evidence.

emphasized that it was John Nabors, not Correll, who actually shot the three victims who died. Second, counsel endeavored to present Nabors as the "leader" and "planner" of the criminal endeavor, accentuating the facts that "Mr. Nabors was the one that knew Guy Snelling was a drug dealer," and that "Snelling would have money and drugs [when] the robbery occurred. In addition, counsel drew the court's attention to Snelling's statement that "it appeared to him that John Nabors was the leader, was the one calling the shots, so to speak." Finally, counsel pointed out that, prior to the robbery, it was impossible for Correll reasonably to have anticipated that anyone would be present in the home other than Snelling, and that, consequently, Correll could not have planned the three deaths.[18]

Third, Correll's attorney also argued for mitigation, both in his sentencing memorandum and at oral argument, on the grounds that Correll was under the influence of drugs and alcohol at the time of the murders.[19] Counsel specifically drew the sentencing judge's attention to Snelling's statement to the police that he smelled alcohol on Correll's breath during the crimes.

Fourth, counsel presented Correll's troubled

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[18] At the time of sentencing, Arizona state law explicitly provided that such inability reasonably to foresee that one's conduct would cause death to another person was a statutory mitigating factor. Ariz. Rev. Stat. § 13-703(G)(4).

[19] A defendant's inability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law is a statutory mitigating factor. *See* Ariz. Rev. Stat. § 13-703(G)(1).

family history, explaining that "the reason that Mike [Correll] has had problems is the fact that when he was 14 years old, that both of his parents abandoned him and what can be expected when someone is abandoned by their parents at such an early age?" Finally, Correll's attorney also argued that Correll's age—24—was mitigating.[20]

Although Correll's attorney knew that Correll had received psychological counseling, he declined to develop psychological evidence because he believed, based on his conversations with Correll, that the only possible diagnosis was antisocial personality disorder. As counsel explained at the evidentiary hearing, he believed such a diagnosis would carry little, if any, mitigating weight with the sentencing judge and would, in fact, make it easier for the judge to sentence Correll to death because it would cause him to view Correll as permanently psychologically damaged.[21]

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[20] A defendant's age is a statutory mitigating factor. *See* Ariz. Rev. Stat. § 13-703(G)(5).

[21] As the district court summarized the evidence presented at the sentencing hearing:

> Rather than argue Petitioner's personality disorder to Judge Howe, [counsel] decided that Petitioner had a better chance to avoid the death penalty if he portrayed that Petitioner was involved in a drug ripoff which had gone terribly wrong, that Petitioner had only been a follower in the matter, that he had not been the trigger-man as to the three people who died, that Guy Snelling had reported to police that Petitioner was under the influence of drugs and/or alcohol at the time of the

(Continued)

C

The sentencing judge ultimately found four statutory aggravating circumstances.[22] Determining that the mitigating evidence did not outweigh these factors, the judge sentenced Correll to death on each of the murder counts. The Arizona Supreme Court affirmed Correll's convictions, with the modifications previously mentioned. It then re-weighed the aggravating and mitigating factors and determined that the death penalty was appropriate. *Correll*, 715 P.2d at 736.

In his state petition for postconviction relief, Correll alleged that his counsel rendered ineffective assistance at sentencing. He contended that during the month that elapsed between the jury verdict and the sentencing hearing, his attorney met with him for just five minutes. He also contended that his attorney failed to investigate and to develop available evidence relating to his psychiatric history and condition at the time of the crimes. The state trial court summarily dismissed Correll's petition, concluding that Correll raised "no colorable issues" relating to ineffective assistance of counsel. The court went on to explain that "the Court specifically recalls that the trial work of

(Continued).

crimes, and that he should be shown sympathy because his family abandoned him at the age of 14.

[22] The Supreme Court has since held that Arizona's practice of judges finding aggravating factors violates the Sixth Amendment right to a jury. *See Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* does not apply, however, to cases such as this one that were already final on direct review. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

defense counsel was precise, careful, and competent, and manifested strategic and tactical judgments of the same high quality." The Arizona Supreme Court denied review without comment.

Correll later filed a federal petition for writ of habeas corpus and the district court entered summary judgment against him. On appeal ("*Correll I*"), we held that Correll's ineffective assistance allegations, which had not been fully explored in state court, entitled him to an evidentiary hearing. We held that Correll had established (1) that the state court trier of fact had not conducted a full and fair hearing to find the relevant facts, and (2) that his allegations, if proven, might constitute a colorable ineffective assistance claim. *Correll v. Stewart*, 137 F.3d 1404, 1411-12 (9th Cir.1998).

D

Pursuant to our instructions on remand, the district court conducted an evidentiary hearing on Correll's ineffective assistance of counsel claim. The evidentiary hearing lasted nine days. The district court heard testimony from 17 witnesses, 14 called by Correll (who waived his appearance), and three called by the government. In addition, the district court reviewed reams of documents, including Correll's attorney's notes, which were nearly a quarter-century old, and Correll's childhood medical records, which were two decades older.

After outlining all the evidence in a detailed 109-page disposition, the district court made several

findings. First, as to the sufficiency of counsel's consultation with Correll, the court rejected Correll's allegation that counsel spent only five minutes with him between conviction and sentence. Instead, the district court found that "[p]rior to sentencing, [counsel] had multiple face-to-face meetings and phone calls with Petitioner" in which he "discuss[ed] with Petitioner the overall mitigation case and the specific reasons he would present to the court in favor of a life sentence rather than the death penalty."

Second, as to the sufficiency of counsel's investigation of possible mitigating evidence, the district court found that counsel spoke to between 40 and 50 witnesses, including every member of Correll's family who would cooperate. The district court further found that, unfortunately, "[t]he witnesses were not able to provide relevant useful mitigation information." In fact, "in many instances, the witnesses only provided inculpatory and non-mitigating information."

The district court did find that counsel's performance was constitutionally deficient in two respects: (1) counsel's failure to obtain medical treatment records relating to the head injury Correll suffered at seven years old and (2) counsel's failure to thoroughly review Correll's mental health records. The court determined that a reasonable attorney would have investigated these matters for possible mitigating evidence rather than relying on his own impression, based on his interaction with the defendant, that the defendant had no intellectual or psychological deficits that could serve as mitigating evidence.

Nevertheless, the district court found that Correll was not prejudiced by these errors. After Correll's postconviction counsel developed all the evidence relating to Correll's head injury and mental health history, the district court still found Correll to be a "highly functioning adult" who never suffered from brain damage or a major psychological disorder. Thus, the district court found that Correll's medical and mental health records provided no substantial evidence of mitigation. Furthermore, the district court found that much of the new evidence Correll offered would have been counterproductive if put before the sentencing judge because it would have "opened the door for the prosecution to come forward with strong damaging rebuttal information to counter its mitigating effect."

II

In reversing the district court's judgment, the majority concludes that the district court committed "clear error" in finding that counsel's investigation and presentation of possible mitigating defenses was constitutionally sufficient. Under the clearly erroneous standard of review, our scrutiny of a district court's factual findings must be "significantly deferential, in that we must accept the district court's factual findings absent a definite and firm conviction that a mistake has been committed." *Hovey v. Ayers*, 458 F.3d 892, 900 (9th Cir. 2006) (quoting *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002)) (internal quotation

marks omitted).[23] In other words, as long as the district court's account of the evidence " 'is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.' " *Phoenix Engineering and Supply Inc. v. Universal Elec. Co., Inc.*, 104 F.3d 1137, 1141 (9th Cir.1997) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

Unfortunately, the majority ignores these instructions and embarks on its own independent examination of the facts presented to the district court. By contrast, as indicated by its exhaustive 109-page disposition, the district court's findings were well-supported by the facts and reached only after a thorough review of all available evidence. I simply cannot agree that the district court's findings were erroneous at all, let alone clearly erroneous.

More alarming than its reconstruction of the record, however, the majority jumps with startling speed from its new factual determination that Correll received ineffective assistance of counsel to its ultimate conclusion that his habeas petition must be granted. In so doing, the majority ignores Strickland's second requirement, that even if Correll proves ineffective

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[23] Because Correll's petition for a writ of habeas corpus was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, pre-AEDPA law governs our review. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

assistance of counsel, he must also prove that the result was actually prejudicial. *Wiggins*, 539 U.S. at 534 (citing *Strickland*, 466 U.S. at 692). As the Supreme Court has made clear, we do not presume prejudice from counsel's ineffective assistance. *Strickland*, 466 U.S. at 693. Rather, even if counsel's performance was deficient, Correll still bears the "*highly demanding and heavy burden* of establishing actual prejudice." *Allen*, 395 F.3d at 1000 (internal quotation marks omitted) (emphasis added). This burden "affirmatively[to] prove prejudice" requires Correll to show more than the mere possibility that counsel's performance prejudiced the outcome. *Strickland*, 466 U.S. at 693. Instead, Correll must demonstrate "a reasonable probability" that, but for counsel's constitutionally deficient performance, he would have received a lesser sentence. *Id.* at 695.

In assessing prejudice in this case, it is important to remember that "we are not asked to imagine what the effect of certain testimony would have been upon us personally," *Stewart v. Smith*, 140 F.3d 1263, 1270 (9th Cir.1998), or even to imagine the effect of such testimony on an abstract juror. Instead, we must determine what the effect of Correll's new evidence would have been upon the Arizona sentencing judge at the time of Correll's sentencing hearing 23 years ago. *Id.* As discussed below, none of the evidence unearthed during the district court's evidentiary hearing creates a "reasonable probability" that Correll would have received a lesser sentence had it been presented at the sentencing phase of his trial. Accordingly, I cannot conclude that Correll has met the heavy burden required to establish prejudice.

A

First, Correll's attorney's failure to obtain the medical records relating to Correll's childhood head injury was not prejudicial because these records did not, in fact, demonstrate any brain damage. After receiving testimony from neuropsychologists, the district court found that Correll "did not suffer any brain injury from the block wall that fell on him when he was 7 years old." Quite to the contrary, the district court credited a neuropsychologist's testimony that "of all the capital defendants he has tested, Petitioner is one of the highest functioning."

The medical records from the incident support this assessment. After his childhood injury, Correll was diagnosed with a subgaleal hematoma, which is a bruise or collection of blood under the scalp, but above the skull. The hematoma cleared in five days, at which time a doctor described the seven-year-old Correll as alert and well. I accordingly cannot agree with the majority's conclusion that Correll has carried his burden to establish a reasonable probability that he would have received a lesser sentence if the records relating to his childhood head injury had been before the sentencing judge. Indeed, as we have suggested before, counsel's failure to present "mitigating evidence may be irrelevant when no substantial mitigating evidence is available." *Smith v. Stewart*, 189 F.3d 1004, 1013 n. 4 (9th Cir.1999) (citing *Gerlaugh v. Stewart*, 129 F.3d 1027, 1042 (9th Cir.1997)). The medical records, which led the district court to conclude that Correll was a "highly functioning adult,"

presented no opportunity for mitigation.

B

In assessing the remainder of Correll's mitigating evidence, it is important to emphasize that the majority's conclusion that Correll has met the heavy burden of demonstrating actual prejudice ignores a mountain of precedent which requires us to consider not only the benefits of the ostensibly mitigating evidence counsel failed to present, but also its potential drawbacks. In *Darden v. Wainwright*, 477 U.S. 168, 186 (1986), trial counsel's failure to present any mitigating evidence did not constitute deficient performance because the presentation of such evidence would have opened the door to damaging rebuttal evidence. Similarly, in *Burger v. Kemp*, 483 U.S. 776 (1987), trial counsel's failure to present psychological records did not amount to ineffective assistance because the records were "by no means uniformly helpful to petitioner," as they suggested "violent tendencies" that would have undermined counsel's strategy of portraying petitioner's actions as the result of another person's "strong influence upon his will." *Id.* at 793. Based on these cases, we have held that an attorney who failed to present psychological testimony relating to the defendant's antisocial personality disorder was not ineffective because such testimony "would have allowed the prosecution during cross-examination and rebuttal to rehash the horrific details of [the] crimes." *Bonin v. Calderon*, 59 F.3d 815, 836 (9th Cir.1995). Most recently, the Supreme Court, in *Wiggins v. Smith*, 539 U.S. 510 (2003), repeatedly emphasized that the Darden-Burger line of cases

remains in effect. In Wiggins, the Court held that the petitioner had met his heavy burden of proving actual prejudice because "Wiggins d[id] not have a record of violent conduct" that the State could have introduced to offset the mitigating evidence his attorney failed to offer. *Id.* at 537. The majority fails to realize that unlike Wiggins, much of the new mitigating evidence Correll offers would have enabled the prosecution to present very damaging evidence in rebuttal. Indeed, Correll's mitigating evidence presents precisely the type of "double edge" the Supreme Court found lacking in Wiggins's case. *Id.* at 535 (distinguishing the mitigating evidence presented by Wiggins from the double-edged evidence presented in *Burger*, 483 U.S. 776, and *Darden*, 477 U.S. 168).

1

I begin with Correll's new psychiatric evidence, which would not have significantly helped his case. The district court found that "there is insufficient evidence to support that Petitioner has ever suffered from any major mental illness, whether PTSD [post traumatic stress disorder], a major depressive disorder, or a bipolar disorder." The district court reached this factual finding after two psychological experts testified that there was no evidence Correll has ever suffered from these disorders. The sole witness who speculated that Correll might have suffered from post traumatic stress disorder acknowledged that such a diagnosis was "only a possibility." The district court found Correll's self-reporting of bipolar disorder and severe depression incredible in light of Correll's obvious motive to fabricate and in light of the fact that these

diagnoses do not appear in his records and Correll indicated that he was never given medication to treat them.

The district court also found that the evidence did not support Correll's contention that he was given anti-psychotic medications while in custody. In reaching this factual finding, the district court noted that the mental health experts for both parties scrutinized Correll's medical records from the California Department of Corrections ("CDC") and reported the absence of any indication that anti-psychotic medication was ever prescribed. Although it appears that Correll was given Mellaril for a period of time as a juvenile, the government's mental health expert, Dr. John Scialli, M .D., testified without opposition that the dosage—25 milligrams—would have served as a mild tranquilizer and was far lower than the dosage that would be utilized to counteract psychosis (approximately 625 milligrams).

Accordingly, had Correll's attorney thoroughly reviewed Correll's mental health records, he would have only had credible evidence for the diagnosis he already suspected: antisocial personality disorder accompanied by mild depression. As we have repeatedly acknowledged, a diagnosis of antisocial personality disorder may be "potentially more harmful to [a] petitioner than [helpful]." *Gerlaugh*, 129 F.3d at 1035. We have explained that, because of its "obvious countervailing tactical dangers," such evidence "[i]n its best possible light, it is a basket of cobras." *Id.* Accordingly, in a prior case, "we c[ould] identify no prejudice flowing from counsel's failure to develop"

psychiatric testimony relating to a defendant's anti-social personality disorder. *Id.*; *see also Darden*, 477 U.S. at 186-87 (counsel's decision not to present mitigating character or mental-state evidence was sound trial strategy because it would have opened the door to damaging rebuttal evidence, including a psychiatric opinion that the defendant had a sociopathic personality); *Daniels v. Woodford*, 428 F.3d 1181, 1204, 1210 (9th Cir. 2005) (indicating that testimony suggesting that a capital defendant is a "sociopath" is aggravating rather than mitigating); *Beardslee v. Woodford*, 358 F.3d 560, 583 (9th Cir. 2004) (acknowledging that an antisocial personality diagnosis can be damaging to a capital defendant), *Caro v. Woodford*, 280 F.3d 1247, 1257 (9th Cir.2002) (concluding that a psychologist's testimony did not help the defendant's mitigation case because it tended "to paint him as a violent psychopath"); *Clabourne v. Lewis*, 64 F.3d 1373, 1384 (9th Cir. 1995) (noting that mental health records omitted from the sentencing hearing "hardly turned out to be helpful" because they indicated that the defendant had "an antisocial personality"); *Williams v. Calderon*, 52 F.3d 1465, 1472 (9th Cir.1995) ("We have no doubt that ... statements [suggesting that the defendant is sociopathic] did nothing to advance Williams's cause.").

Furthermore, had counsel presented Correll's mental health records at sentencing, he would have opened the door for the prosecution to present extremely damaging rebuttal evidence that would have likely eviscerated the minimal mitigating impact these records carried. The district court "credit[ed counsel's] testimony that the prosecutor, Sidney Davis, had a

reputation for excellent preparation and that she would have left no stone unturned in her opportunity to rebut any mitigation evidence presented." Accordingly, the district court found that, had Correll's attorney presented mental health evidence, this "highly skilled" prosecutor would have presented a great deal of aggravating evidence that was not already before the sentencing judge, specifically: (1) Correll's rape of a female psychotic patient while being treated for his antisocial personality disorder and mild depression; (2) Correll's numerous escapes from mental health treatment facilities and numerous rejections of institutional efforts to provide him with mental health treatment; (3) an incident where Correll took hostages in an armed attempt to escape from a mental health treatment facility; (4) the underlying factual basis of Correll's prior convictions for armed robbery; (5) the conclusion of a social evaluation at age 18 that Correll was a danger to the community and was not a candidate for probation; (6) additional information showing the efforts of Correll's parents to deal with his drug abuse problem and to obtain psychological treatment for him following his armed threat against a teacher at school; (7) Correll's statement that he had no desire to work but only wished to enjoy himself; and (8) Correll's statement that when he committed the 1978 armed robberies that it gave him a strong sense of power and excitement.

Finally, presentation of Correll's antisocial personality disorder at sentencing would have severely undermined counsel's strategy of arguing that Correll was merely following Nabors's lead during the commission of the crimes. Had counsel introduced

evidence of Correll's antisocial personality disorder diagnosis, the prosecution would have almost certainly responded by pointing out that Correll, at age 18, instigated the armed robbery of three convenience stores at gunpoint, an effort in which he enlisted the assistance of his 13-year-old brother and 15-year old girlfriend. We have previously held that counsel's failure to present psychological evidence is not prejudicial where it would have distracted the fact-finder from counsel's main mitigation theory and other mitigation evidence. *See Bonin,* 59 F.3d at 836 (finding that counsel's failure to present expert psychological testimony was not prejudicial because it "would have distracted jurors ..., reduced [the defendant's] credibility with the jury, and opened the door to powerful cross-examination and rebuttal"); *see also Burger*, 483 U.S. at 793 (holding that a petitioner failed to prove ineffective assistance where the affidavits detailing the defendant's behavioral history his attorney failed to present "are by no means uniformly helpful to petitioner because they suggest violent tendencies that are at odds with the defense's strategy of portraying petitioner's actions on the night of the murder as the result of [another person's] strong influence upon his will").

In sum, the psychological evidence, if presented, would have demonstrated only that Correll has an antisocial personality with mild depression. Such evidence has tremendous potential to be more harmful than helpful. Further, such evidence would have opened the door for the prosecution to introduce a laundry list of extremely damaging information not already before the sentencing judge and would have

crippled Correll's chances of convincing the sentencing judge that he was merely following Nabors's lead during the crimes.[24] Accordingly, contrary to the majority's conclusion, Correll cannot prove a reasonable probability that he would have received a lesser sentence if the available psychological evidence had been before the sentencing judge.

2

Given the lack of substantial mitigation found in Correll's medical and psychiatric records, Correll cannot claim to have been prejudiced by counsel's failure to offer further evidence of Correll's drug use beyond what he already presented to the sentencing judge. The district court found that there was no evidence-other than Correll's self-serving statements-that Correll was significantly impaired *at the time of the crimes.* Arizona law at the time provided that "[a] defendant's intoxication or alcoholism at the time of

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[24] While the majority concludes that "a significant portion of that damaging rebuttal evidence was already available through the pre-sentence report," Maj. Op. at 5464, it fails to acknowledge what Correll's counsel realized, that the introduction of some potentially mitigating evidence would open the door to a parade of horribles. For example, while the presentence report summarily discloses Correll's conviction of three counts of armed robbery in 1978, Correll's attorney understandably wanted to preclude damning rebuttal evidence revealing that Correll enlisted his 13-year-old younger brother and his 15-year-old girlfriend in these crimes. Furthermore, the presentence report is silent regarding other extremely damaging information that the prosecutor would have surely brought to light in rebutting certain potentially mitigating evidence.

the offense is a mitigating circumstance *if* the evidence shows that it significantly impaired the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *State v. Zaragoza*, 135 Ariz. 63, 659 P.2d 22, 30 (Ariz.1983) (emphasis added). The district court specifically found that Correll's behavior during the murders indicated he was not intoxicated:

> [I]t was Petitioner who remained calm when the gun misfired as Nabors was trying to kill Robin Cady. It was Petitioner who encouraged Nabors to remain calm as there were no cars coming, to get a shell chambered and shoot Cady. Such behavior at the time of the crime does not demonstrate intoxication and, in fact, undercuts an assertion of intoxication.

See Williams v. Woodford, 384 F.3d 567, 624 (9th Cir.2004) (reasoning that there is little basis for believing that drugs materially affected the defendant's behavior at the time of the crimes when the facts of the crimes reflect deliberate and methodical action).

Furthermore, no witnesses could have established that Correll was intoxicated on the date of the crimes. The best evidence Correll can point to would have come from his sister, who could have testified that Correll used methamphetamine in the morning on the day *before* the crimes. Correll was not prejudiced by counsel's decision not to present his sister's testimony, however, because cross-examination would have eviscerated any remaining residual doubt

in the sentencing judge's mind as to Correll's guilt. Correll maintained his innocence throughout the sentencing proceedings. However, Correll's sister knew he was with Nabors at the time of the crimes and that they had sought a ride out of the state very soon after the murders occurred. Accordingly, as the district court found, her testimony would have "totally eliminated any mitigating weight" and residual doubt from Correll's assertion at the guilt phase of his trial that it was his brother, not he, who had committed the murders. *See Allen*, 395 F.3d at 1004 (explaining that "mitigation witnesses proffered by [the defendant] would not have proved helpful given their own involvement in [the defendant]'s criminal enterprise."); *Williams v. Woodford*, 384 F.3d 567, 624 (9th Cir.2004) ("[T]he best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt.").

The only other witness Correll's postconviction counsel presented relating to drug use was Dawn Day, who testified that she used methamphetamine with Correll during a four month period from November 1982 until February 1983. We cannot consider Day's testimony, however, because Correll failed to establish that Day was available to testify at his sentencing hearing. *See Douglas v. Woodford*, 316 F.3d 1079, at 1086 n. 2 (9th Cir.2003) (explaining that testimony presented at a district court evidentiary hearing that was not available to counsel at the sentencing hearing may not be considered for prejudice purposes). Furthermore, even if Correll had established that Day

would have been available, Day's testimony that Correll used methamphetamine more than one year before the crime would have provided little support for Correll's argument that, *at the time of the crime*, he was so impaired that he was unable "to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *Zaragoza*, 659 P.2d at 30.[25]

The majority attempts to minimize counsel's complete inability to present any corroborating evidence that Correll either used methamphetamine on the date of the crimes or appeared intoxicated to anyone he encountered that day by instead pointing to expert testimony that "gross methamphetamine intoxication, unlike gross alcohol intoxication, is not necessarily apparent to outside observers." Maj. Op. at 5463. Consequently, the majority appears content to rely exclusively on Correll's self-serving statement that he was intoxicated at the time of the crimes to reach the conclusion that counsel's failure to present further evidence of his drug use was prejudicial. I, on the other hand, would prefer to rely on the credibility findings made by the district court. Those findings bear repeating in full:

> The Court does not credit [Correll's] unsubstantiated self-report that he abused

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[25] Indeed, there was evidence in the record that suggests that Correll was *not* intoxicated at the time of the crimes. Specifically, when Correll and Nabors entered Snelling's trailer home, the first thing they asked Snelling was "whether he had any speed."

methamphetamine every day before the crimes were committed. Petitioner chose not to testify at the evidentiary hearing; Petitioner chose not to fully cooperate with [the government's drug abuse expert's] examination of him regarding the issue of drug abuse. Because of the obvious motive to fabricate, Petitioner's self-serving statements about his drug usage prior to the crimes is [sic] unreliable and subject to searching skepticism. *See, e.g.*, [*State v.*] *Medrano*, 914 P.2d [192,] 227 [(Ariz.1996) ("the defendant provided most of the information concerning his use of cocaine in the past and on the night of the murder, as well as the drug's effect on him. Because of the obvious motive to fabricate, such self-serving testimony is subject to skepticism and may be deemed insufficient to establish mitigation.")]; *see also Bernard Smith* [*v. Stewart*], 140 F.3d 1263,] 1270 [1998] (evaluating evidence based on impartial sentencing judge applying Arizona law); *see generally*, *Strickland*, 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). The Court's searching skepticism toward Petitioner's self report is corroborated by Respondent's drug abuse expert, Dr. Matthews, who opined as follows: "Antisocial personality disorder is characterized by malingering and deceit; instances of [Petitioner's] lifelong pattern of deceptiveness abound throughout his penal and other records. He has been deceitful about a

> great many matters, including his history of substance abuse. Because of [Petitioner's] history of deceit, it is a major clinical error to accept [Petitioner's] self-serving view of his condition at the time of the offense as accurate."

Because there was no other evidence to establish that Correll was intoxicated at the time of the crimes, I cannot agree with the majority that Correll was prejudiced by counsel's failure to present expert testimony regarding the effects of methamphetamine addiction at the sentencing hearing. Conversely, I agree with the district court that counsel's decision reflects a reasonable strategic choice. First, the district court found that "any expert would have to take into account the underlying facts of the crimes, which show that [Correll] was involved in deliberative acts, such as planning, conspiring, avoiding detection, ... awareness of wrongdoing," and the fact that he was "generally orientated [as] to time, place, and reality." This would have materially undermined counsel's strategy of portraying Correll as merely following Nabor's lead. Second, the district court acknowledged that any expert "would have been forced to utilize hypothetical supposition regarding [Correll's] conduct at the time of the crimes," and that "[s]uch hypothetical supposition would have opened the door for contrary rebuttal argument and reiteration by the prosecution regarding the lack of factual support and incredulity of [Correll's] alleged intoxicated condition at the time of the crimes."

Yet it is solely on the strength of such "hypothetical supposition" that the majority now declares that the district court was "clearly wrong" to

conclude that there was no evidence to support Correll's assertion that, on the night of the crimes, he was "grossly intoxicated—to the point of being unable to appreciate the wrongfulness of his conduct," as required for mitigation. Maj. Op. at 5464. The majority points to the testimony of two drug abuse experts presented by Correll's post-conviction counsel at the evidentiary hearing. The district court, however, reasonably declined to credit these experts' opinions because they were not based on an examination of Correll but instead were based on a hypothetical set of facts provided by Correll's postconviction counsel. As the district court explained:

> Dr. Sullivan did not examine Petitioner nor did he look at Petitioner's Arizona Department of Corrections or CDOC records. Rather, Dr. Sullivan was asked to assume [a set of] hypothetical facts[that] do not accurately or reliably portray Petitioner's alleged drug abuse.... [H]is opinion was based on unsubstantiated and unreliable assumptions.

In addition, Correll's other expert witness on drug addiction, Dr. Shaw, whom the majority quotes for the proposition that Correll "may have been experiencing drug-induced paranoia" at the time of the murders, Maj. Op. at 5461, was "thoroughly impeached" at the evidentiary hearing. As the district court explained, "Dr. Shaw admitted that he only minimally considered the facts of the crime before reaching his conclusion." The district court found Dr. Shaw's opinion "entirely not credible and wholly speculative" because, like Dr. Sullivan's opinion, it was

"based upon hypothetical drug usage at the time of the crimes that was not established."

In stark contract to the hypothetical assumptions on which Drs. Sullivan and Shaw based their opinions, the district court found that, except for 229 days, Correll was incarcerated throughout the nine-year period between October 1975 (when he was first incarcerated, at age 14) and March 1984 (one month before the murders) and that Correll "was not a methamphetamine addict or a long-term abuser of methamphetamine during the time he was incarcerated."

Consequently, I agree with the district court that counsel's failure to present further evidence of Correll's drug use was not prejudicial. Counsel had already stated that Correll had been using alcohol and drugs and presented Snelling's statement that he smelled alcohol on his captor's breath. I agree with the district court that if Correll's attorney had called an expert to testify, "it is highly likely any lay witness basis for the expert's opinion could have been cross-examined at sentencing and impeached by virtue of the fact that no lay witness could testify that Petitioner was intoxicated at the time of the crimes." I also credit the district court's observation that "if an expert had testified based solely on Petitioner's self-reporting ... it is very likely that the expert's opinion would have been severely undermined by undisputed evidence that Petitioner had spent almost 9 of the last 10 years incarcerated with little or no access to drugs."

Nevertheless, the majority's independent review

of the expert testimony leads it to conclude that the evidence "*clearly established* that methamphetamine use, in the quantities that Correll *indisputably* used the drug on a regular basis, would significantly impair judgment and consciousness without causing perceptible symptoms of intoxication." Maj. Op. at 5464 (emphasis added). I do not quarrel with the notion that severe use of methamphetamine may significantly impair judgment and consciousness. Whether the symptoms of methamphetamine intoxication are perceptible or not, however, it is quite disputable that Correll used the drug "on a regular basis" and it is entirely unproven that Correll used the drug on the date of the crime.

Accordingly, I share the district court's inability to find that Correll was prejudiced by counsel's decision not to present additional evidence of drug use beyond what he already had.[26]

Finally, Correll has presented no credible

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[26] I would further note that a drug defense likely would have evoked less sympathy from an Arizona sentencing judge 22 years ago than it does from the court today. *See Mayfield v. Woodford*, 270 F.3d 915, 931 (9th Cir.2001) (crediting testimony that there were "no death penalty cases tried in San Bernardino County prior to 1983 where a drug defense had been successful in gaining either an acquittal or in reducing the sentence from death to life without parole."). The sentencing judge very likely would have taken note of the fact that Correll never sought treatment for his substance abuse problem and repeatedly secured his removal from the mental health programs in which he was placed either by escaping or by violently assaulting the staff.

evidence about his childhood that his attorney could have placed before the sentencing judge other than the evidence the sentencing judge already had before him. The district court, who is in the best position to determine credibility, found Correll's uncorroborated allegation that his mother banged his head against a kitchen table incredible. In regard to the head injury Correll suffered at age seven when a cinder block wall fell on him, the district court expressly found that Correll's parents were not negligent in securing medical care. After reviewing the medical records presented at the evidentiary hearing, the district court found that Correll's parents took him to the family doctor the same day the accident occurred and "acted reasonably in caring for Petitioner, which included two visits to their family doctor, one emergency room visit and a follow-up visit for additional specialized testing."

The majority cites evidence of Correll's family history provided by Reverend Curry, whom the district court found "was not an available witness" for counsel at the time of the sentencing hearing. The district court found "that if [Reverend Curry] had been contacted by [counsel] prior to sentencing, he would have informed him that he would not discuss information about Petitioner or appear at sentencing because it was against California law for him to discuss former residents of the CYA."[27] Accordingly,

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[27]While the majority quotes Reverend Curry's testimony that he "would have unhesitatingly come to help" Correll, see Maj. Op. at 5446 n. 2, I credit the district court's finding that at the time of the sentencing hearing he was unavailable to help. Reverend Curry testified that he "cannot offer testimony or assertions regarding

(Continued)

Reverend Curry's testimony cannot factor into the prejudice analysis. *See Douglas*, 316 F.3d at 1086 (explaining that testimony presented at a district court evidentiary hearing that was not available to counsel at the sentencing hearing may not be considered for prejudice purposes).

The majority suggests that counsel should have presented evidence of Correll's parents' religious fanaticism as Jehovah's Witnesses, specifically their decision, "[a]fter Correll was shot in the arm at age 14," to "cut off all communication with their son and consider[ ] him dead, as required by their church's teachings." Maj. Op. at 5460. Of course, the majority's analysis ignores the district court's finding that, by age 14, Correll had "already been arrested several times," that his parents had responded by providing him with "extensive psychological treatment," and that only after "another arrest" did his parents allow him to become a ward of the state.

Similarly, the majority suggests that counsel should have presented evidence that Correll's parents used corporal punishment "in response to his obvious substance abuse problems." Maj. Op. at 5460. Once again, the majority ignores the district court's finding

(Continued)

people who have been in California Youth Authority [because] [i]t is forbidden by law." Reverend Curry testified that while others could contact him, he "could not make contact with" counsel and when he "talked with [his] supervisors about it, ... they said no." Furthermore, defense counsel testified that when he contacted Reverend Curry's wife, she informed him that the Reverend "didn't really want to be involved."

that, had counsel emphasized such evidence, the prosecution would have countered with evidence that Correll's parents took him to a private psychologist and participated in a six-month treatment program with him after Correll was expelled from the eighth grade for threatening a teacher with a knife.

Finally, the majority indicates that evidence of incest in the family could have served as mitigating evidence. Maj. Op. at 5459. At the evidentiary hearing, Correll's sister Patty testified that their father had been arrested and convicted of child molestation. Correll's sister Robin testified that she suffered "repeated and continual" sexual molestation at the hands of her father and her brothers, specifically Correll himself. Because the prosecution almost certainly would have presented such evidence in rebuttal, Correll cannot claim that he was prejudiced by counsel's failure to present evidence of incest as a mitigating fact.

Accordingly, on balance, presentation of family history evidence would have been counterproductive. I cannot agree with the majority's conclusion that Correll has met his burden to prove that, had counsel presented more detailed evidence about his childhood, he would have received a lesser sentence.

III

The sum of the majority's analysis in this case simply eviscerates the requirement that a habeas petitioner demonstrate actual prejudice in order to prevail on a claim for ineffective assistance of counsel.

See Wiggins, 539 U.S. 510. Not satisfied with merely reconstructing the facts, the majority also reinvents Supreme Court authority, asserting that Correll presented evidence sufficient to establish a presumption of prejudice under *Wiggins*, and that this "classic mitigation evidence ... certainly had the potential to persuade at least one fact-finder that Correll was, at the time of the crimes, incapable of appreciating the wrongfulness of his conduct." Maj. Op. at 5462. These statements, of course, are patently absurd, as even a cursory review of the facts in *Wiggins* reveals that Correll fell drastically short of carrying the demanding burden of proving actual prejudice the Supreme Court found sufficient in that case.

In holding that Wiggins had met his burden to prove actual prejudice, the Supreme Court explained that Wiggins "experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother," that he suffered "physical torment, sexual molestation, and repeated rape" during his subsequent years in foster care, and that he spent time homeless. *Id.* at 512. Perhaps most critically, Wiggins was mentally retarded. *Id.*

In stark contrast, Correll's history, which reveals that he was "a highly functioning adult" at the time of his crimes, comes nowhere close to the "powerful mitigating narrative" present in *Wiggins*. *Id.* at 513. Furthermore, the Supreme Court noted that Wiggins lacked a "record of violent conduct," *id.* at 537, and found no evidence "suggest[ing] that a mitigation case, in its own right, would have been

counterproductive." *Id.* at 525. Correll's history, on the other hand, littered with numerous examples of his violent and destructive lifestyle, stands at the very opposite end of the spectrum. Indeed, the district judge, who was in the best position to evaluate all the evidence, concluded that, after considering both the positive and negative repercussions of Correll's new evidence, the balance of aggravation and mitigation had "barely been altered."

Viewed against the standard set forth by *Strickland* and rearticulated in *Wiggins*, the majority's conclusion that the insubstantial mitigating evidence Correll now offers was sufficient to meet the "highly demanding and heavy burden of establishing actual prejudice" not only misapplies the test these cases impose, it essentially writes the prejudice requirement out of our circuit jurisprudence altogether.

Accordingly, I must respectfully dissent.

APPENDIX B

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DISTRICT OF ARIZONA
By_____
DEPUTY

IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF ARIZONA

Michael Emerson Correll, Petitioner, v. Charles L. RYAN,[1] et al. , Respondents.	) No. CV 87-1471-PHX-SMM)) Death Penalty))) MEMORANDUM OF DECISION AND ORDER

This matter is before the Court following a remand from the Ninth Circuit Court of Appeals for an evidentiary hearing and determination whether Petitioner's trial counsel rendered ineffective assistance of counsel at sentencing. See Correll v.

[1] Charles L. Ryan is substituted for his predecessor, Terry Stewart, as Acting Director, Arizona Department of Corrections. Fed.R.Civ.P.25(d)(1).

Stewart, 137 F.3d 1404 (9th Cir. 1997). The Court has conducted a nine day evidentiary hearing regarding whether sentencing counsel's performance was deficient and, if so, whether Petitioner was prejudiced by such performance. In accordance with the mandate established by Strickland v. Washington, 466 U.S. 668 (1984), and its progeny, the Court concludes that sentencing counsel's performance was deficient in only two sentencing phase aspects, but that Petitioner did not suffer prejudice. Therefore, Petitioner is not entitled to habeas relief.

Prior to the evidentiary hearing, Petitioner filed a written waiver stating that he did no wish to be present or participate at the evidentiary hearing. (File doc. 269.) At the beginning of the evidentiary hearing, Petitioner, appearing by video conference, reiterated his request not t be present at or participate in the hearing. The Court questioned Petitioner and his counsel and determined that Petitioner validly waived his right to be present at the hearing. Subsequently, at the evidentiary hearing, the Court received testimony from Stephen Collins, Petitioner's trial counsel; Edward Yue, a trial investigator for Petitioner; Mary Durand, Petitioner's habeas mitigation specialist; Brian Kellner, Petitioner's habeas investigator; Robin (Correll) Miranda and Patricia (Correll) Wilson, Petitioner's sisters; Dawn Day, friend of Petitioner; Robert Curry, Chaplain at California Youth Authority; Susan Curry wife of Champlain Curry; Dr. Judith Becker, Dr. Anne Herring, Dr. C.J. Shaw, Dr. John Sullivan, Petitioner's mental health and drug abuse experts; Dr. John Scialli, Dr. Daniel Martell, Dr. Daryl Matthews,

Respondent's mental heath and drug abuse experts; and Timothy Ford, Esq., Petitioner's ineffective assistance of expert.

I. BACKGROUND FACTS

Petitioner was tried and convicted in a triple homicide which occurred on April 12, 1984, Maricopa County, Arizona. In the early morning hours of April 12, 1984, Petitioner and John Nabors went to the trailer home of Guy Snelling, a co-worker of Nabors. Debra Rosen, Snelling's girlfriend, was with Snelling in the trailer. Nabors pretended to be in urgent need of help and persuaded Snelling to let him in the trailer. Once in the trailer, Nabors pulled a gun on Snelling and demanded money. Petitioner tied Rosen's and Snelling's hands behind their backs with duct tape and led Rosen into the bedroom.

Later. Robin Cady, who was renting a room from Snelling, and Shawn D'Brito, Cady's boyfriend, returned to Snellings home. Petitioner then tied Cady's and D'Brito's hands behind their backs with duct tape.

At gunpoint, Nabors shoved Snelling throughout his home, robbing him and the others of money, valuables, and drugs. After robbing them, Nabors and Petitioner forced Snelling, Cady, and D'Brito into Cady's car. While Petitioner remained in the car holding the victims hostage with the gun, Nabors went back into the trailer and strangled Rosen to death.

Petitioner and Nabors then drove the three

victims to a desert area north of Phoenix. Petitioner and Nabors made them lie face down on the ground. Petitioner shot Snelling in the back of the head (Snelling miraculously survived and witnessed the events that followed). Nabors then took the gun and murdered D'Brito and tried to shoot Cady. The gun misfired a couple of times. When the gun misfired Petitioner encouraged Nabors to remain calm as there were no cars coming, and to get a new shell chambered. Nabors then murdered Cady.

Hours after the murders, Nabors fled to Prescott, Arizona. Several days thereafter, when police surrounded his hotel room, Nabors shot and killed himself. A short time following Nabors' death, Petitioner was arrested at this father's home in Las Vegas, Nevada.

At trial and sentencing, Petitioner was represented by Stephen Collins, Assistant Maricopa County Public Defender. At trial, Collins defended Petitioner on the basis of misidentification, arguing that it was more likely Petitioner's brother Terry committed the murders with Nabors.[2] Before trial, Collins filed a Rule 11 motion to determine whether Petitioner was competent to stand trial. The court appointed a psychologist, Dr. Leonardo Garcia-Bunuel, to interview Petitioner to determine if a complete psychiatric examination was necessary to determine

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[2] Petitioner has maintained his innocence throughout all proceedings and continues to maintain his innocence.

his competency. (Exhibit 54; M.E. 10/11/84.)[3] Dr. Garcia-Bunuel interviewed Petitioner and obtained a short psychiatric history. which included a commitment to a mental health center and a head injury at the age of 7. (Exhibit 55.) Dr. Garcia-Bunuel concluded that Petitioner was competent to stand trial and that further psychiatric examination was necessary. (Id.)

October 23, 1984, Petitioner was convicted by a jury. On November 7, the State filed its sentencing memorandum. (Exhibit 57.) On November 16, the Adult Probation office submitted its detailed presentence report to the trial judge, the Honorable Joseph D. Howe. (Exhibit 53.) On November 21, Mr. Collins responded to the State's sentencing memorandum. (Exhibit 58.) On November 23, the trial court conducted the presentence hearing. (Exhibit 14.)

The trial court found the existence of four (4) aggravating factors beyond a reasonable doubt: that defendant had previously been convicted of a violent felony, that defendant committed the offense in expectation of pecuniary gain, that the murders were committed in an especially cruel, heinous or depraved

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[3] "Exhibit" refers to exhibits admitted at the federal evidentiary hearing; "R.T." refers to the reporter's transcripts of the federal evidentiary hearing; "File doc." Refers to documents in the federal habeas file; "M.E." refers to minute entries of the state court' "R.O.A." refers to the state court record on appeal; the "State R.T." refers to the reporter's transcripts of the state trial record.

manner and multiple homicides.[4] The trial court concluded that the mitigation evidence presented was insufficient to call for leniency. The trial court stated that there was no aspect of Petitioner's character, propensities, or record, or any circumstance of the offenses, which called for leniency, and sentenced Petitioner to death. (Special Verdict, 11/23/84.) Following sentencing, Judge Howe formally complemented Collins on his outstanding performance on all matters during the litigation. (State R.T. 11/23/84, at 35.)

II. STANDARD OF REVIEW

To prevail on a claim of ineffective assistance of counsel (IAC), a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). "A convicted defendant making a claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690.

Performance Standard

Under Strickland, petitioner must show that "counsel made errors so serious that counsel was not

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[4] The Arizona Supreme Court affirmed the existence of three (3) aggravating factors, but denied the multiple homicides factor as this factor became effective after the crime was committed but before defendant was sentenced. State v. Correll, 148 Ariz. 468, 715 P.2d 721 (1986).

functioning as the counsel guaranteed the defendant by the Sixth Amendment." Id. at 687. The performance inquiry is whether counsel's assistance was reasonable considering all the circumstances. Id. at 688. The Strickland Court took occasion to consider whether effective assistance of counsel required that counsel for a criminal defendant follow certain prescribed standards or rules. The Strickland Court rejected such an approach:

> Prevailing norms of practice as reflected in American Bar Associations standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89; accord Anderson v. Calderon, 232 F.3d 1053, 1086 (9th Cir. 2000) ("Strickland's relatively elastic standards make clear that there is no one correct formula for effective assistance in Sixth Amendment terms."), abrogated on other grounds recognized, Osband v. Woodford, 290 F.3d 1036, 1043 (9th Cir. 2002); Jefferies v. Blodgett, 5 f.3d 1180, 1198 (9th Cir. 1993) (citing Strickland for the proposition that "the ABA standards serve only as a 'guide' for determining whether an attorney's performance is

adequate"). Thus, pursuant to Strickland, counsel need not follow a particular set of standards of guidelines in order to be found effective. Rather, there are countless ways to provide effective assistance in any given case. 466 U.S. at 689.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. For instance, counsel's performance is evaluated by what reasonable counsel would have done at the time, including an evaluation of state law sentencing strategies. See Siripongs v. Calderon, 35 F.3d 1308, 1315 (9th Cir. 1994) (stating that under California law, a defendant may provide evidence of "residual doubt" as to his guilt during the penalty phase). Petitioner must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Strickland, 466 U.S. at 689. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of a particular case, viewed as of the time of counsel's conduct."Id. at 690.

The Strickland Court considered counsel's duty to investigate and present mitigating evidence at a capital sentencing proceeding, and held, as follows:

> These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in

> this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and acts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91.[5] When counsel's investigation is being assessed for reasonableness, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. at 691.[6]

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[5] The Strickland Court stated that the propensities of a sentencing judge toward harshness or leniency may factor into defense counsel's selection of a strategy regarding mitigation evidence. Thus, it is a factor counsel may consider during a sentencing proceeding. Id. at 695.

[6] Petitioner's attorney expert Tim Ford opined regarding his understanding of 1984 capital mitigation investigation standards. See, e.g., R.T. 10/24/01, at 77-79. Respondents challenged the 1984 standards proposed by Mr. Ford as being set too high. See, (Continued)

Since Strickland, in determining the reasonableness of a capital mitigation investigation, the Supreme Court has been highly deferential in its judicial scrutiny regarding counsel's performance. In Darden v. Wainwright, 477 U.S. 168, 186-87 (1986), for example, the Court held counsel's investigation sufficient finding it reasonable for counsel not to introduce mitigating evidence. Had defense counsel attempted to present the available mitigation evidence, the Court concluded that it would have opened the door to damaging rebuttal evidence. Id. Similarly, in Burger v. Kemp, 483 U.S. 776, 789-94 (1987), the Court held that counsel's investigation was sufficient to determine that introducing psychiatric testimony or petitioner's testimony or his mother's testimony would subject the witnesses to extremely damaging rebuttal. The Court concluded that the failure to present such mitigating

(Continued).

e.g., id. at 116-133. The Court need not resolve whether the per se standards proposed by Mr. Ford or the per se standards proposed by Respondents are correct. Counsel's duty to investigate mitigating evidence for the sentencing proceeding may not be characterized as one size fits all. As previously discussed, the Strickland Court has clarified that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. The Supreme Court has rejected the argument that counsel's duties and obligations may be exhaustively defined and denominated into a checklist for judicial evaluation. Rather, there are countless ways to provide effective assistance in any capital sentencing proceeding. Strickland, 466 U.S. at 688-89. Given these cautionary statements by the Supreme Court, the Court concludes that it is unwise to accept either Petitioner's or Respondents' arguments as per se rules that defense counsel must always follow.

evidence was reasonable because the presentation of such testimony would have shown defendant's unremorseful attitude, his violent tendencies and his prior criminal acts, all of which were at odds with the defense strategy.

In Williams (Terry) v. Taylor, 529 U.S. 362 (2000), the Court found penalty phase IAC where trial counsel failed to investigate and present substantial mitigating evidence regarding family background, borderline mental retardation and exemplary behavior in prison because the rebuttal evidence was minimal. A reasonable mitigation investigation must involve not only the search for good character evidence but also evidence that may demonstrate that the criminal act was attributable to a disadvantaged background or to emotional and mental problems. Boyde v. California, 494 U.S. 370, 382 (1990).

In Ainsworth v. Woodford, 268 F.3d 868 877 (9th Cir. 2001), a Ninth Circuit panel held that a national standard controls a capital mitigation investigation and that an attorney may not avid a conclusion of deficient performance by claiming that the rigors and requirements of a capital mitigation investigation have changed from locality to locality and over time.[7] The

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[7] Throughout this Order, the Court has followed the Ainsworth's panel holding that a capital mitigation investigation, whether conducted in 1980 or later, must be conducted with the assurance that the capital defendant has received his right to a fair and reliable capital sentencing. Such a right is protected when counsel conducts an individualized sentencing proceeding wherein the background and character of the defendant is considered.

Ainsworth court cited Smith v. Stewart, 189 F.3d 1004, 1009-14 (9th Cir. 1999), in support of its holding that defense counsel had a duty to investigate and present evidence of defendant's background and mental illness at a 1979 Arizona capital resentencing hearing. 368 F.3d at 877; but cf. Hayes v. Woodford, 301 F.3d 1054, 1069 (9th Cir. 2002) (holding that circumstances reasonably existed which allowed counsel to limit the capital mitigation investigation "particularly considering the prevailing legal norms at the time [counsel] represented [petitioner] in 1981"); Jennings v. Woodford, 290 F.3d 1006, 1015-16 (9th Cir. 2002) (stating that 1983 California legal norms apply to a capital mitigation investigation conducted by counsel in 1983); Karis v. Calderon, 283 F.3d 1117, 1133 (9th Cir. 2002) ("counsel in 1982 was not constitutionally compelled to do the extent of family history research that petitioner's counsel now presents"); Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995) ("Certainly in 1981, Hendricks attorneys did not believe they had any duty to investigate [his] social history in the face of the unanimous opinion of their own experts that there was no basis for a mental defense.").[8]

Due to rebuttal evidence that may be presented by the prosecution at the penalty phase, the Ninth Circuit

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[8] Similar to the findings of the courts in Hayes, Jennings, Karis and Hendricks, at the evidentiary hearing, Mary Durand, a highly regarded capital mitigation specialist in Arizona, testified that the standard of practice in Arizona for capital mitigation investigations has increased dramatically since 1984. (See R.T. 6/6/01, at 103–04.)

has ruled that defense counsel must reasonably consider whether the presentation of certain mitigating evidence will open the door to powerful and damaging rebuttal evidence. See Campbell v. Kincheloe, 829 F.2d 1453, 1462 (9th Cir. 1987). If counsel unreasonably presents mitigation that opens the door to damaging rebuttal evidence, counsel may be found ineffective. Wade v. Calderon, 29 F3d 1312, 1323-24 (9th Cir. 1994) (reversing the district court and concluding that counsel's choice not to have defendant's mother and sister testify but to have defendant testify regarding potential mitigation of child abuse and multiple personality disorder was IAC because defendant's testimony resulted in additional incriminating evidence being introduced at the sentencing hearing). In essence, the law requires counsel to walk a fine line with regard to the strategic choices that must be made.

Prejudice Standard

The prejudice component of the Strickland test focuses on whether counsel's deficient performance renders the result of the sentencing unreliable or the proceeding fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 372 (1993). In order to demonstrate prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Discussing the prejudice standard the Strickland Court stated:

The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision...When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge...Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account

> of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent errors.

Id. at 695-96.

III. COUNSEL'S PERFORMANCE AT SENTENCING

On May 15 and 16, 2001, trial counsel, Stephen Collins, testified before this Court. Collins graduated from the University of Minnesota where he majored in Psychology. Collins obtained his J.D. from Creighton University. Collins became a member of the Arizona bar in 1980 and immediately began work for the Maricopa County Public Defender's office. At present, Collins continues to work for the Maricopa County Public Defender's office in the appellate division. From 1980 to 1986, Collins worked in the trial division. Prior to being assigned Petitioner's case, Collins had been assigned to various types of cases from misdemeanor DUI's to first degree murder cases. Petitioner's case was Collins' first capital case assignment and the only capital case he tried before moving to the appellate division in 1986. Before Petitioner's case, he had tried numerous non-capital murder cases.

Collins estimated that during the time period 1982-84, there were 20 experienced criminal trial attorneys in his office, that all of them were trying murder cases

and that most had tried capital cases. Because this was Collins' first capital trial, he sought out the advice and assistance of experienced attorneys, both at the trial and sentencing stages of the case, including John Foreman, who also worked as a public defender in his office and was recognized capital defense expert.[9] Additionally, Collins had attended death penalty seminars prior to being assigned his first capital case. At various times during the case, he had the assistance of 3 people from the public defender's office – Investigators Gloria Castillo, Edward Yue and Jack Richmond. In 1984, it was the exception rather than the rule that the public defender's office appointed 2 attorneys to a death penalty case.

The initial assessment of both Collins and Petitioner was that the government had overwhelming evidence of his guilt and there was little available mitigation evidence. Collins knew that he needed to present mitigating evidence to the sentencing judge and that the burden of proof of establishing mitigation was on the defendant. Collins estimated that he interviewed 40 to 50 or more witnesses about mitigation information as well as information related to Petitioner's guilt phase defense. At the conclusion of Collins' mitigation investigation, Collins did not have substantial mitigation evidence to present; he also

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[9] Petitioner's IAC attorney expert Tim Ford verified that John Foreman was a capital defense expert. Ford testified that in 1984, four defense attorneys, one of whom was John Foreman, had informally agreed that they would provide assistance to all defense attorneys handling capital cases in Arizona. (R.T. 10/24/01, at 36.)

knew that the aggravating case against Petitioner was a strong one. Moreover, Collins understood that the presentation of certain mitigating evidence would allow the prosecution to present rebuttal evidence of specific acts that were extremely harmful to Petitioner.

As part of Collins' investigation, he traveled to Las Vegas to interview Petitioner's family. He interviewed Petitioner's father, brother Tim and sister Robin.[10] Collins asked all of the family members to assist him by providing information that would make Petitioner more sympathetic to Judge Howe. The family members did not provide sympathetic evidence about Petitioner. Neither did the family members provide dysfunctional family information to Collins. Prior to the Las Vegas trip, Petitioner had not informed Collins of allegations that his parents physically abused him as a child or any other allegation regarding a dysfunctional family history. When Petitioner's mother was contacted, she refused to become involved in the case.

In Las Vegas, Collins also interviewed Karen Downey, one of Petitioner's girlfriends. Petitioner had informed Collins that he was with Downey when the murders occurred. Contrary to Petitioner's story, Downey informed Collins that she was not with him when the murders occurred. Thus, she could not

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[10] There was a dispute about whether Collins interviewed Robin. Collins' testimony was corroborated by Investigator Edward Yue, who also participated in the interview of the family members. (R.T. 5/15/01, at 28; Exhibit 31 at 3.) The Court finds Collins credible on this point.

provide an alibi defense. For Collins, this became of the first of many instances where Petitioner conveyed false information. Such information resulted in Collins pursuing false leads and caused Collins to question the veracity of information provided Petitioner.

The record demonstrates that Collins maintained regular contact with Petitioner, both pre-trial and prior to sentencing. (See Exhibit 34, at 25; Exhibit 29, at 9.) Prior to sentencing, Collins had multiple face-to-face meetings and pone calls with Petitioner during which Collins discussed the mitigation evidence. (Id.) The Court specifically finds that Collins did discuss with Petitioner the overall mitigation case and the specific reasons he would present to the court in favor of a life sentence rather than the death penalty. (See, e.g., R.T. 5/16/01, at 92.)

However, during the period following his conviction and prior to sentencing, Petitioner became pessimistic about his chances for receiving a life sentence and no longer wanted to cooperate with Collins' mitigation investigation. Collins testified as follows:

Q: Now after the trail, did you ask Mr. Correll to help you prepare for sentencing?
A: Yes.
Q: And did you ask for names of witnesses from Mr. Correll?
A: Yes.

* * *

Q: Did you contact everyone he gave you?
A: We tried to contact everyone he gave us.

* * *

Q: Did there come a time when Mr. Correll indicated that he didn't want to help you anymore?
A: Yes, basically.
Q: And how did that come about?
A: Basically, he said he just wanted to be sentenced immediately and get it over with.
Q: And when approximately, did that take place?
A: That was between the verdict and sentencing.

* * *

Q: Did he state a reason why he did not want to be involved any further?
A: Yes.
Q: Can you elaborate?
A: He said basically he was going to get convicted of the death penalty and he wanted to get down to the Department of Corrections, so he could get his Christmas package. If we delayed it, he wouldn't get his Christmas package.

(R.T. 5/16/01 at 107-09.) Despite Petitioner's attitude, Collins continued to investigate.

The Court specifically finds that Collins did maintain regular contact with Petitioner prior to sentencing and rejects Petitioner's allegation that Collins only spent five minutes with him between conviction and sentence. (See e.g., Exhibit 29, at 9.) Petitioner did provide names of persons for Collins to contact prior to sentencing, including Susan Curry. Collins followed-up and interviewed or tried to interview the persons Petitioner had suggested. (See R.T. 5/16/01, at 107-09.) The witnesses were not able to provide relevant useful mitigation information. In

fact, in many instances, the witnesses only provided inculpatory and non-mitigating information.

Specifically, Susan Curry testified that Collins contacted her prior to sentencing to obtain mitigating evidence. When Collins contacted Mrs. Curry, she informed him that she was a probation officer.[11] This information misled Collins into believing that Mrs. Curry was a probation officer in 1976, during the time when Petitioner was at the CYA. (R.T. 5/16/01, at 119.) In 1984, due to her experience as a probation officer, Mrs. Curry was familiar with mitigation evidence. Mrs. Curry testified that Collins was especially interested in good character or good behavior evidence regarding Petitioner. She informed Collins tht Petitioner had confessed to her about his involvement in the murders and she was surprised that he had not confessed to Collins.[12] (See Exhibit 34.)

Rev. Robert Curry, who was a Chaplain at the CYA where Petitioner was housed from 1976 to 1978,

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[11] Mrs. Curry is the wife of Robert Curry, Chaplain of the California Youth Authority at El Paso de Robles (CYA). Rev. Curry was the Chaplain during the time that Petitioner was housed at the juvenile authority from 1976 to 1978. From 1976 to 1978, Mr. Curry was not a probation officer, just the wife of Chaplain Curry.

[12] Mrs. Curry testified that when Petitioner was 17 or 18, he wrote to her and expressed his love to her; she testified that she discouraged him on this point. After Petitioner left CYA, Mrs. Curry testified that she visited him probably once every 3-4 months at different California prisons and provided him with some financial assistance.

testified that if he had been contacted by Collins prior to sentencing, he would have informed him that he would not discuss information about Petitioner or appear at sentencing because it was against California law for him to discuss former residents of the CYA. (R.T. 6/8/01, at 102-03.) Consequently, Rev. Curry was not an available witness for Collins and his testimony cannot now be used against Collins to demonstrate IAC at sentencing. See Douglas v. Woodford, 316 F.3d 1079, 1086 I(i9th Cir. 2003) (under prejudice prong, Ninth Circuit does not consider expert testimony presented at district court evidentiary hearing if such evidence was unavailable to trial counsel due to petitioner's lack of cooperation); United States v. Green, 21 F.Supp.2d 521, 525 (D. Md. 1998) (counsel not ineffective for failing to interview witness who was not available to testify at trial); State v. Jurek, 594 A.2d 553, 555 (Me. 1991) ("To show [IAC] prejudice from the failure to interview a witness, however, the petitioner must demonstrate both the witness's availability for trial and the nature of the witness's testimony.").

IV. COUNSEL'S ALLEGED DEFICIENCIES AT SENTENCING

A. Failure to Obtain and Present Psychological Mental Health Evidence

Petitioner argues that trial counsel was deficient in failing to obtain and present his mental health records as mitigation at sentencing. (File doc. 414 at 67-68.) Petitioner further argues that counsel should

have retained and called expert mental health witnesses to present mitigation evidence at his penalty phase hearing. (Id.)

1. Failure to Obtain Mental Health Records

Collins testified that he did have information about Petitioner's mental health prior to sentencing. Collins had multiple interviews with Petitioner during which Petitioner provided Collins with his version of his mental health history, including the juvenile court's commitment of him to Gateways Hospital and Community Health Center (Gateways) on at least two occasions. (See Petitioner's Exhibit 34, at 10, 13-15, 25; Exhibit 55, 59, 60.) Collins had reviewed the prescreening competency evaluation performed by Dr. Garcia-Bunuel which had found Petitioner competent to stand trial.[13] Collins testified that he was certain about his knowledge, prior to sentencing, that Petitioner was properly diagnosed as having a sociopathic/narcistic personality disorder. (R.T. 5/15/01, at 176-78, 187-89). Although Collins did not obtain Petitioner's mental health records to document that he had been diagnosed with an antisocial personality disorder,[14] he believed that the diagnosis

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[13] Based on his interviews and personal interactions with Petitioner, Collins did not believe his competency was an issue. (R.T. 5/15/01, at 147-49.) When Petitioner demanded that Collins file a Rule 11 motion alleging that he was incompetent to stand trial, Collins filed the motion and the trial court appointed Dr. Garcia-Bunuel to evaluate Petitioner. Id.

[14] Generally, a personality disorder is a fixed and inflexible dysfunctional personality trait. An antisocial personality disorder

(Continued)

was inevitable.[15] During his interviews with witnesses, including Petitioner's family, Collins was informed that Petitioner had been in trouble practically his entire life and that from his early childhood, he had been associated with violent criminal activity.[16] (See R.T.

(Continued).

is an enduring pattern of perceiving and relating to the world that is characterized by a lack of respect for an violation of societal norms against society.

[15] Prior to sentencing, Collins did not obtain Petitioner's CYA records or his California Department of Corrections (CDOC) records. Petitioner's post-conviction relief counsel did obtain a 1978 CDOC psychological evaluation which verified that Petitioner was diagnosed with a personality disorder. (R.T. 5/16/01 at 96-97; Exhibit 72.) However, most of Petitioner's Gateways' mental health records were destroyed in 1986 due to the passage of time and thus were unavailable. Cf. Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (finding counsel's performance deficient for not performing adequate mental health investigation or obtaining mental health records after counsel had been put on notice that the records would document petitioner's history of a serious mental health problem (schizophrenia), where such records were later destroyed. and where there was no indication that introducing the mental health records would open the door to damaging rebuttal evidence).

In contrast to Evans, however, in this case the presentation of Petitioner's mental health records opens the door to extremely damaging rebuttal information, including his rape of a female psychotic patient undergoing treatment, escapes from treatment facilities and armed aggression against mental health employees during his residency at mental health treatment facilities. (See infra page 66.)

[16] Collins testified that in preparation for trial he interviewed 40 to 50 or more witnesses. During these interviews, he was preparing for both the guilt phase and searching for mitigating evidence. (R.T. 5/16/01, at 107.) The Court finds Collins credible on these points.

(Continued)

5/15/01, at 126-29; R.T. 6/6/01, at 148, Exhibit 29, at 3-4 (McMurdie Interview).) Petitioner's rap sheet, which was included in his presentence report, confirmed this information. (Exhibit 53.) Based on his interviews with Petitioner and the witnesses who confirmed Petitioner's history of violent criminal behavior, his own investigation and the police investigation, the rap sheet of Petitioner, his undergraduate psychological training, and his experience as a litigator, Collins knew that if he were to obtain past mental health reports, the antisocial personality disorder diagnosis was inevitable.

In addition to facts demonstrating an antisocial personality disorder, Collins knew and understood Judge Howe's sentencing practices. Based on collaboration with other assistant public defenders and their experience with Judge Howe, Collins concluded that Judge Howe probably would not find such personality disorder evidence decidedly favorable, especially because the crime was a brutal triple homicide committed execution style.[17] Collins believed

(Continued).

[17] Judge Howe was formerly employed by the same public defender unit as Collins and many attorneys in this unit were personally familiar with Judge Howe and his sentencing practices.

Petitioner questioned Collins about his strategy in not noticing and replacing Judge Howe. See Rule 10.2, Ariz.R.Crim.P. Collins credibly testified that he properly considered and decided not to notice Judge Howe due to his expertise in trial practice and evidence; Collins did not inadvertently forego the right to notice Judge Howe. (R.T. 5/16/01, at 37.) Because there were crucial evidentiary issues in the case, Collins credibly testified the advantage to having Judge Howe was his considerable expertise as (Continued)

Judge Howe would consider relevant mitigation evidence but would not give such evidence significant mitigating weight.[18] Furthermore, Collins knew that if he presented personality disorder evidence, it would open the door for the prosecution to present rebuttal

(Continued).

a trial judge.

The Court takes judicial notice of Judge Joseph D. Howe's distinguished career as a defense attorney, professor, judge and Harvard scholar. Judge Howe received both his undergraduate degree and his law degree from the University of Arizona. Subsequently, he went on to receive his LL.M. from Harvard Law School.

Judge Howe was not only an experienced trial attorney but also a Harvard law professor in both trial practice and evidence. His career also included being a professor of law at Case Western Reserve University and a visiting professor of law at the University of Iowa. Judge Howe was a faculty member for numerous state and national institutes for trial advocacy. Based on this distinguished record. Collins accurately relied on the fact that Judge Howe was an expert in trial practice and evidence.

[18] The Court rejects Petitioner's argument that Collins based his sentencing strategy on the belief that Judge Howe would not consider constitutionally relevant mitigation evidence at sentencing. (R.T. 5/16/01, at 37-38.) The Court finds that such an allegation, that a trial judge consciously would not follow the law, is repugnant. Collins did not testify that Judge Howe would refuse to consider relevant mitigating evidence at sentencing. (See, e.g., R.T. 5/15/01, at 169.) Rather, Collins testified that because Judge Howe would not give the antisocial personality diagnosis substantial weight in mitigation, Collins chose not to include it in his mitigation presentation.

For the same reason, the Court also rejects Attorney Tim Ford's testimony that Collins had to assess and make strategic decisions based upon a trial judge who would not follow the law with respect to the proper consideration and weighing of relevant mitigating evidence during sentencing. (R.T. 10/24/01, at 88-89.)

evidence. Collins did not want to present mental health evidence that would open the door for the prosecution to present the circumstances underlying Petitioner's previous convictions, upon which an antisocial personality disorder diagnosis was inevitable. (Exhibit 53; R.T. 5/15/01, at 201; 5/16/01, at 102-106, 128-47.) Collins was aware that the prosecutor, Sidney Davis, had an excellent reputation for thoroughness in her preparation and would leave no stone unturned regarding an opportunity to present rebuttal evidence to claims of mitigation.[19] (R.T. 5/16/01, at 153-54.)

Collins estimated that Petitioner had one chance in twenty for a life sentence if he did not present the psychological diagnosis but only one chance in fifty if he presented Petitioner's psychological diagnosis to Judge Howe.[20] (R.T. 5/16/01, at 42.) Rather than argue Petitioner's personality disorder to Judge Howe,

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[19] The Court credits Collins' testimony that the prosecutor, Sidney Davis, had a reputation for excellent preparation and that she would have left no stone unturned in her opportunity to rebut any mitigation evidence presented. (R.T. 5/16/01, at 153-54.)

[20] Collins testified that if the matter had been before a different judge, he might have presented such psychological mitigation evidence. The Court finds Collins credible on this point.

Regarding the possibility of replacing Judge Howe, Collins could not have known and did not know who would have replaced Judge Howe had he been noticed. Collins also would have had to consider whether the prosecution would notice the replacement judge. Collins testified that if, through the entire process, he believed that he would have ended up with a more favorable judge, both for trial and for sentencing, he would have noticed and replaced Judge Howe. (R.T. 5/16/01, at 147-48.) The Court finds Collins credible on these points.

Collins decided that Petitioner had a better chance to avoid the death penalty if he portrayed that Petitioner was involved in a drug ripoff which had gone terribly wrong, that Petitioner had only been a follower in the matter, that he had not been the trigger-man as to the three people who died, that Guy Snelling had reported to police that Petitioner was under the influence of drugs and/or alcohol at the time of the crimes, and that he should be shown sympathy because his family abandoned him at the age of 14. (R.T. 5/15/01, at 199, 212, Exhibits 14, 58.) Collins concluded that any psychological diagnosis of Petitioner could not be presented and argued without producing witnesses and other evidence that might destroy any residual doubt arising from the presentation of his misidentification defense at trial and the mitigation theory Collins intended to presents regarding Petitioner being only a follower in the drug mishap and not the trigger-man.

2. Failure to Retain a Mental Health Expert

Collins testified that he did not obtain a mental health expert to opine at sentencing that Petitioner had a personality disorder because Collins believed that it would be easier for Judge Howe to sentence Petitioner to death if he knew that Petitioner had been diagnosed with an antisocial personality disorder. (R.T. 5/15/01, at 199-202.) Collins acknowledged that Judge Howe would consider and give effect to constitutionally relevant mental health evidence, but believed that once Judge Howe knew Petitioner's diagnosis, he would find it easier not to show sympathy and sentence him to death. (Id. at 167-170.) Likewise, Collins did not believe that Judge Howe would give

substantial mitigating weight to antisocial personality disorder evidence. (Id. at 199-202; 5/16/01, at 47.) On the other hand, Collins did believe that there was some possibility hat Judge Howe might give Petitioner a break for not being the trigger-man in the murders. Thus, based on his knowledge of Judge Howe's sentencing practices and tendencies, Collins' strategy at sentencing was to portray Petitioner as the least culpable perpetrator.

When asked why he did not secure a mental health expert to examine and verify the antisocial personality disorder diagnosis prior to sentencing, Collins explained the problem with this course of action. In order to have a psychiatric evaluation performed, Collins would need to obtain a contact visit order from Judge Howe. If, as Collins suspected, the diagnosis was antisocial personality disorder, Collins would not have the psychiatrist testify or submit a report prior to sentencing. Based on his experience as a former public defender, Judge Howe would undoubtedly realize that a psychiatric evaluation was performed but no expert testified or submitted a report because the psychological evaluation cast Petitioner in a negative light. (R.T. 5/15/01, a 184-85.) Therefore, Collins did not secure a mental health expert to examine and provide him with a report regarding Petitioner's mental health. On cross-examination, Collins reiterated that by putting Petitioner's mental health at issue, there was a substantial possibility that extremely damaging rebuttal information could have been presented by the prosecution, including the details underlying his previous convictions which would not otherwise come before the sentencing judge.

(R.T. 5/16/01, at 102-106, 128-47.)

Discussion

The Court must evaluate whether Collins' strategic choices made after less than a complete mitigation investigation were reasonable, considering all the circumstances. See Strickland, 466 U.S. at 690-91. Counsel's decisions regarding sentencing strategy, when based on an adequate inquiry, are generally immune from attack under Strickland. See Gerlaugh v. Stewart, 129 F.3d 1027, 1033 (9th Cir. 1997). Counsel has an obligation to investigate and consider any and all potential mitigation evidence. See, e.g., Caro v. Calderon, 165 F.3d 1223, 1227i (9th Cir. 2001). However, counsel also has an obligation not to present damaging evidence or evidence that would open the door to damaging rebuttal evidence; introducing such evidence may be IAC. See Wade, 29 F.3d at 1323; see also Karis, 283 F.3d at 1136 (affirming sentencing counsel's tactical decision not to put on psychiatrist due to damaging evidence that was in his report). Thus, counsel must walk a fine line in the presentation of mitigation evidence understanding that certain evidence presented in mitigation could harm defendant if his conviction is reversed on appeal.

Arizona recognizes that an antisocial personality disorder may constitute non-statutory mitigating evidence, even though it does not rise to the level of a statutory mitigating factor.[21] See State v. McMurtrey,

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[21] In Arizona, mitigation evidence is divided into statutory and non-statutory factors. A.R.S. § 13-703(G) comprises the list of (Continued)

136 Ariz. 93, 102, 664 P.2d 637, 646 (1983); see also Smith (Bernard) v. Stewart, 140 F.3d 1263, 1270 (9th cir. 1998).

In this case, the Court must consider whether it was reasonable for Collins not to obtain Petitioner's mental health records or retain a mental health expert so that Petitioner's mental health could be presented in mitigation at sentencing. Collins did not present such evidence because he anticipated that Judge Howe would not be sympathetic to it, especially because the murders were so very brutal. Collins was aware that the State would present damaging rebuttal evidence if he made Petitioner's mental health an issue at sentencing.

Although Strickland recognized that the tendencies of a particular judge may influence counsel's selection of a particular strategy at sentencing, Strickland only described one type of strategic choice that may be rendered reasonable in reliance upon such a rationale. See 466 U.S. at 695, 699 (deference provided to counsel's tactical decision to appeal to the sentencing judge's view on the importance of taking responsibility for one's crimes, where the judge's views were well-known to counsel

(Continued).

relevant statutory mitigation factors under review by the sentencing judge. Pursuant to Lockett v. Ohio, 438 U.S. 586 (1978), and its progeny, a sentencing judge in Arizona is not precluded from considering any relevant mitigation evidence as non-statutory mitigation. Relevant mitigation evidence includes any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

and defendant had taken responsibility for his crimes in his guilty plea).[22] Strickland's recognition that defense counsel may make strategic decisions based upon a judge's sentencing tendencies is especially important in Arizona because at the time of Petitioner's trial, the death penalty was imposed by the trial judge when an aggravating circumstance was established beyond a reasonable doubt and mitigating circumstances were not sufficient to warrant leniency.[23]

The Court examines for reasonableness the following information underlying Collins' decision not to further investigate Petitioner's mental health. Collins knew that Petitioner, as a juvenile, had been committed to a mental health center in California on at least two occasions. Based on his observations of Petitioner, the psychiatric screening by Dr. Garcia-Bunuel, and the many crimes listed in Petitioner's rap sheet. Collins did not believe that Petitioner had any serious mental health condition, other than an antisocial personality disorder. Collins knew that Judge Howe would not be particularly sympathetic to the presentation of sociopathic/psychopathic mitigating evidence and would not likely give such evidence substantial mitigating weight. Collins also knew that

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[22] In Strickland, the defendant pled guilty to 3 capital counts and then waived his right to an advisory jury for his sentencing. Against the advice of his attorney, the defendant chose instead to be sentenced by the trial judge who had presided over his guilty plea. 466 U.S. at 672.

[23] Since the publication of Strickland, the Court has encountered a dearth of authority construing strategic decisions based upon a sentencing judge's tendencies.

presenting Petitioner's antisocial personality disorder diagnosis would open the door for the prosecution to present the circumstances underlying his previous convictions since those convictions would be utilized to establish the diagnosis.

Notwithstanding Strickland's recognition that defense counsel's duty to investigate, develop and present mitigating evidence can be reasonably based on a judge's sentencing tendencies, the Court reluctantly and narrowly concludes that Collins' performance was deficient because he failed to review Petitioner's mental health records from Gateways and CDOC before making sentencing strategy decisions. See Smith (Bernard), 140 F.3d at 1269 (holding counsel deficient for not obtaining mental health mitigation evidence that was near the surface but not presented.) At sentencing, Collins knew that the prosecution had a bundle of aggravating evidence and that without a strong case in mitigation, his client would receive the death penalty. (Exhibit 57; File doc. 111, Police Reports and Investigation.) In the face of this overwhelming aggravating evidence, Collins limited his investigation of Petitioner's mental health.

Collins' strategic choice to limit his investigation was based on his theory that Petitioner's mental health problems were limited to antisocial personality disorder evidence which Judge Howe would not find significant. Collins' theory, even though strategic, was not a reasonable justification for stopping his mitigation investigation because Petitioner could have suffered from other mental health problems. Collins should have obtained Petitioner's mental health

records from Gateways and CDOC or had Petitioner evaluated by a mental health expert in order to confirm his theory that Petitioner's mental health problems were limited to an antisocial personality disorder.

Collins' strategic choice to limit his investigation was also based on his conclusion that the sentencing judge had a negative opinion towards such personality disorder evidence. Taking into account the sentencing judge's views towards antisocial personality disorder alone is not a sufficient reason to limit the investigation because Collins never confirmed that this was Petitioner's only mental health disorder.

Similarly, Collins' observation of Petitioner and his reliance upon Dr. Garcia-Bunuel's report is not a justifiable strategic reason. Dr. Garcia-Bunuel's report is not a justifiable strategic reason. Dr. Garcia-Bunuel's report was not intended to be relied upon as a gauge of potential mitigation evidence and his 35-minute interview of Petitioner was not intended to be a comprehensive mental health examination. (See Exhibit 55, Affidavit of Dr. Garcia-Bunuel.) Collins' mental health investigation of Petitioner was incomplete and therefore deficient.

B. Failure to Obtain and Present Neuropsychological Evidence

Petitioner argues that trial counsel was deficient in his mitigation investigation by not obtaining Petitioner's medical records and by not having him evaluated by an expert when he learned that Petitioner

had suffered a head injury when he was 7 years old[24]. (File doc. 414, at 68-69.) Petitioner argues that following such an evaluation, trial counsel should have had the expert present available mitigation evidence at his sentencing hearing. (Id.)

Collins testified that he knew Petitioner, at age 7, had a backyard block wall fall on him injuring his head. (R.T. 5/15/01, at 130.) Collins did not obtain the medical treatment records arising out of the injury. (Id.) Based on his personal interactions with Petitioner, Collins concluded that he was not aware of any possible brain damage or serious mental impairment that manifested itself in Petitioner while

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[24] Additionally, Petitioner self-reported two other head injuries to his habeas mental health experts. First, he alleges that his mother hit his head on a kitchen table until his face was discolored and swollen. (Exhibit 20, at 2.) Next, when he was 14 or 15, he alleges he was in a one-car wreck, attempting to commit suicide.

Petitioner informed neither Collins nor Dr. Garcia-Bunuel of these incidents. (See Exhibit 55.) In addition, Petitioner chose not to testify at the evidentiary hearing regarding these incidents. The Court does not find Petitioner's self-report credible; Petitioner did not submit competent evidence to substantiate either occurrence. Because of the obvious motive to fabricate, Petitioner's self-serving statements about his mental health is subject to searching skepticism. See, e.g., State v. Medrano, 185 Ariz. 192, 194, 914 P.2d 225, 227 (1996); see also R.T. 11/7/01 at 52 ("Forensically, self-report is useful in limited ways, typically to point to areas where there needs to be collateral information gathering.") (emphasis added).

Further, at the hearing, these incidents were only addressed in passing by habeas counsel. (R.T. 10/4/01, at 38.) In contrast, habeas counsel focused extensively on the head injury occurring at age 7, producing records and other competent evidence of its occurrence.

he represented him. (R.T. 5/15/01, at 202-03.)

The sentencing court was aware of this head injury. Dr. Garcia-Bunuel was appointed by the trial court to determine, pursuant to Rule 11, Ariz.R.Crim.P., if Petitioner was competent to stand trial. In a 35-minute interview with Petitioner, Dr. Garcia-Bunuel took a short psychiatric history, which revealed the head injury. Based on the information obtained during the interview, Dr. Garcia-Bunuel stated that "[t]here is nothing to suggest, after exploring his history in subsequent years, that such concussion may have led to any behavioral changes." (Exhibit 55.)

Discussion

If an injury causes any brain damage, such brain damage carries far more mitigating weight than a personality disorder. See State v. Richmond, 114 Ariz. 186, 197-98, 560 P.2d 41, 52-53 (1976). Personality disorders differ significantly from a slow, dull, brain-damaged defendant whose judgment and rationality are marginal. State v. Ceja, 126 Ariz. 35, 40, 612 P.2d 491, 496 (1980). Major mental impairments, such as brain damage, carry a far greater mitigating effect because it may demonstrate an inability of the defendant to control his conduct. State v. Doss, 116 Ariz. 156, 163, 568 P.2d 1054, 1061 (1977). Minor mental impairments, such as personality disorders, carry de minimum weight.

In Caro v. Woodford, 280 F.3d 1247, 1254 (9th Cir. 2002), the Ninth Circuit held that when counsel is

on notice of a serious mental health issue and does not complete a reasonable mitigation investigation nor provide a reasonable tactical justification, this constitutes deficient performance. See also Evans v. Lewis., 855 F.2d 631, 636 (9th Cir. 1988) (same).

The underlying circumstances supporting Collins' decision to limit his investigation were: (1) Collins' personal interactions with Petitioner which led him to conclude that Petitioner did not have any brain damage or serious mental impairment; (2) Collins' conclusion that absent some evidence to indicate that there was brain damage or serious mental impairment, it was not sound trial strategy to engage an expert because even if he could obtain an expert there was a likelihood that the expert would not discover any brain damage or serious mental impairment and would not testify at the penalty phase; and (3) Collins' reliance upon the report of Dr. Garcia-Bunuel, who stated that Petitioner did not suffer any subsequent behavioral changes arising from the block wall head injury at the age of 7.

The Court narrowly concludes that Collins' performance was deficient. The facts show that Petitioner did suffer a head injury when he was 7 years old. Despite such injury, Collins made the decision not to obtain the medical treatment records arising out of the injury. (R.T. 5/15/01, a 130.) Even though Collins relied, in part, on the findings of the report from Dr. Garica-Bunuel, Collins was aware that Dr. Garcia-Bunuel was not evaluating Petitioner for possible mitigation evidence and that he had not performed any neurological testing upon Petitioner to rule out the

possibility of brain injury or serious mental impairment.

Given the overwhelming aggravating circumstances that Petitioner faced, Collins should have obtained the medical treatment records arising out of the accident. After Collins had obtained these records, he would have been in a position to determine whether to have Petitioner submit to any additional specialized testing and evaluation in his search for available mitigation. In Dyer v. Calderon, 122 F.3d 720 (9th Cir. 1997), vacated on other grounds upon rehearing en banc, 151 F.3d 970 (9th Cir. 1998) (en banc), the Ninth Circuit affirmed counsel's decision not to continue investigating possible organic brain damage. However, in Dyer, the court found that decision reasonable because counsel relied on the assessments of four doctors, three of whom had examined petitioner and failed to indicate in their reports that he suffered from brain damage and one of whom had discovered no structural abnormality after examining petitioner's hospital records and x-rays. 122 F.3d at 736.

The Court acknowledges that Collins was entitled to rely on his own experience, his evaluation of trial strategy, and the report of Dr. Garcia-Bunuel, in limiting this phase of the mitigation investigation. However, due to the aggravating circumstances faced by Petitioner and the potential weight that could be given to any available evidence of brain damage or serious mental impairment, Collins should have obtained the medical treatment records before determining whether Petitioner should be evaluated by

a specialist. Collins' investigation was incomplete and therefore deficient.

C. Failure to Present Methamphetamine Abuse

Petitioner alleges that trial counsel was deficient in failing to present lay witness testimony on the issue of the level of his intoxication in the days prior to and at the time of the crimes. (File doc. 414, at 69.) Further, Petitioner alleges that counsel did not adequately investigate or present his drug addiction history, which included heroin addiction at age 14 and methamphetamine addiction thereafter. (Id. at 68-70.)

1. Intoxication at Time of Crime

At trial, Petitioner claimed misidentification alleging that it was his brother Terry and John Nabors who committed the crimes. At sentencing, Petitioner continued to maintain his innocence. Throughout his state and federal appeals and habeas proceedings, Petitioner has continued to maintain his innocence. Due to his continuing claim of innocence, throughout these remand proceedings Petitioner has refused to specifically discuss with the appointed experts whether, or to what extent, he was under the influence of drugs when he committed the crimes. For instance, when questioned by Respondents' drug abuse expert, Dr. Daryl Matthews, Petitioner was unwilling to discuss his mental state at the time of the offenses, "asserting that he was innocent and that his mental condition was irrelevant." (Exhibit 213, at 4.) Based on Petitioner's continuing claim of innocence and Petitioner's failure to prove otherwise, the Court

concludes that Petitioner did not discuss or attempt to help Collins prove that he was intoxicated when he committed the crimes or that his condition at that time of the crimes would mitigate his sentence.

Collins testified that Petitioner did provide him with the names of persons he was with prior to when the crimes occurred.[25] Collins interviewed a number of witnesses regarding whether Petitioner was impaired by drug and/or alcohol abuse at the time of the crimes. (R.T. 5/16/01 at 68-72.) (R.T. 5/16/01 at 68-72.) Collins testified that these witnesses did not indicate that Petitioner was grossly intoxicated[26] by alcohol

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[25] Because of Petitioner's stance that he had nothing to do with the crimes, Collins' main investigative lead was to interview persons who were with Petitioner at or about the time of the crimes. The Court credits Collins testimony that he interviewed the witnesses that Petitioner provided to him. (R.T. 5/16/01, at 68-72.) Both the police reports (file doc. 111) and Collins' investigative information (exhibit 31) disclose interviews with Jay Emerson Correll, Terry Correll, Robin Correll, Tim Correll, Carol Helton, Patti Malone, Karen Downey, Mike Wilder Beth Harris and Muriel Nabors. All of these witnesses provided information regarding Petitioner and/or information regarding the triple homicides.

[26] Throughout these proceedings, the term "intoxication" has been used to describe both alcohol abuse and methamphetamine substance abuse. The Court specifically finds that whereas alcohol intoxication causes a decrease in one's level of consciousness, methamphetamine intoxication does not diminish one's level of consciousness. Both Dr. John Scialli, Respondents' mental health expert, and Dr. Daryl Matthews, Respondents' drug abuse expert, testified to this fact. (R.T. 11/6/01, at 83 (Matthews); 11/7/01, at 72 (Scialli).) The Court finds Drs. Scialli and Matthews credible on this point. Consequently, the Court's use of the term

(Continued)

abuse or drug abuse on the day of the crime; they did indicate that Petitioner had been using methamphetamine prior to the day the crimes were committed. (Id.)

Based on his interviews with the lay witnesses, Collins credibly testified that he could not prove that Petitioner was grossly intoxicated by methamphetamine at the time of the crimes. The Court credits Collins testimony that, of the witnesses he interviewed who were with Petitioner at or about the time of the murders, they only corroborated that Petitioner was using methamphetamine prior to the day of the crimes. (R.T. 5/16/01 at 68-72.) The Court finds that none of the witnesses could have testified that they observed Petitioner injecting methamphetamine in close proximity to the time the crimes occurred. (Id.)

Collins testimony about lack of proof of gross intoxication at the time of the crimes is corroborated by the fact that when Petitioner and John Nabors gained entry into the trailer home, the first thing they asked Guy Snelling was whether he had any speed. (R.T. 5/15/01, at 217; see also Exhibit 31, Robin Correll interview, 9/18/84, (stating that at the time of the crimes she knew something was about to happen "because they needed money for rent and drugs;" she

(Continued).

"methamphetamine intoxication" does not refer to a diminished level of consciousness but the fact of toxicity in the brain from methamphetamine use resulting in some level of consciousness but the fact of toxicity in the brain from methamphetamine use resulting in some level of impairment, short of psychosis.

"thought [Petitioner] would rob someone')).[27]

At the evidentiary hearing, Robin Correll testified that the morning before the crimes occurred, she witnessed Petitioner and her brother Terry Correll inject some amount of methamphetamine. (R.T. 6/6/01, at 159-60.) Later that night (early the next day), she testified that Petitioner and John Nabors woke her up and informed her that they needed a ride out-of-state right away. (Id. at 160.)

Without proof of gross intoxication at the time of the crime, Collins testified that he could not prove statutory mitigation,[28] that Petitioner did not know

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[27] Collins understood from his investigation and the police reports that Terry and Tim Correll lived together. While Petitioner was in Phoenix, he either stayed with Terry and Tim or at Patti Malone's apartment. Robin Correll and Karen Downey lived at Carol Helton's residence. (Exhibit 31; File doc. 111, Police Reports and Investigation, at 234-238.) Together, John Nabors and Petitioner visited Carol and Robin soon after the murders occurred. In the early morning hours of April 12, 1984, it was Carol Helton who assisted John Nabors in getting out-of-town shortly after the murders. Nabors paid Helton to transport him to Prescott, Arizona. While in Prescott, Nabors killed himself when confronted by the police at his hotel room.

[28] A.R.S. § 13-703 (G)(1) provides that it shall be a mitigating circumstance that the "defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." The factor is phrased disjunctively so that proof of incapacity as to either ability to appreciate or ability to conform establishes the statutory mitigating circumstance. State v. Stokley, 182 Ariz. 505, 520, 898 P.2d 454, 469 (1995).

what he was doing when the crimes were committed.[29] (R.T. 5/16/01 at 68-72.) As a result, Collins did not introduce any methamphetamine evidence through Petitioner's lay witnesses. Robin Correll did not testify either at the guilt or penalty phase of Petitioner's trial. Had Robin testified about Petitioner's use of methamphetamine the day prior to the crimes, she could have been cross-examined about her knowledge of Petitioner's whereabouts at the time of the crimes. Had Robin testified concerning Petitioner's conversations about his need to leave town quickly, she would have disclosed that Petitioner was with John Nabors and had wanted an immediate ride out-of-state very soon after the murders occurred. Such testimony would have totally eliminated any mitigating weight from Petitioner's claim of innocence and residual doubt (i.e., the guilt phase misidentification defense). See Williams v. Woodford, 306 F.3d 665, 772 (9th Cir. 2002) ("The best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt bout his guilt.").

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[29] At the evidentiary hearing, Petitioner did not prove that lay witnesses were available to testify that Petitioner was abusing drugs at the time of the crimes. Other than Robin Correll, no lay witness testified that Petitioner was abusing drugs at that time and that he or she would have been available to testify at the sentencing hearing.

2. Expert Testimony: Drug Intoxication at Time of Crimes

Collins did not engage an expert to discuss the effect of Petitioner's methamphetamine abuse at the time of the crime. Collins testified that without substantial verification from lay witnesses, he could not prove statutory mitigation under A.R.S. § 13-703 (G)(1), i.e., that on the night of the crimes Petitioner's drug abuse significantly impaired his capacity to appreciate the wrongfulness of his conduct or impaired his ability to conform his conduct to the requirements of law. (R.T. 5/16/01, at 70.) The Court finds that the only evidence available to Collins regarding Petitioner's condition at the time of the crimes was that he had abused drugs the morning before the murders; neither Petitioner nor the lay witnesses provided any evidence that the was intoxicated by drugs and/or alcohol at the time of the crimes. Because he did not have the requisite proof for establishing a statutory mitigating circumstance, see A.R.S. § 13-703 (G)(1), Collins decided not to engage a drug abuse expert regarding Petitioner's condition at the time of the crimes. (R.T. 5/16/01 at 67-72, 125-26.)

3. Lay Witness and Expert Testimony: Past Drug Abuse and Addiction

Beyond the presentence report, Collins did not present Petitioner's past history of methamphetamine or other drug abuse. Collins was aware that Petitioner's drug abuse history began at about age 10 but also that he had been incarcerated for the vast majority of his life since the age of 14. At sentencing,

Collins did present non-statutory drug abuse evidence that Snelling had reported to police that Petitioner appeared under the influence of alcohol and/or drugs at the time of the crimes. (R.T. 5/16/01, at 72.)

For strategic reasons, Collins did not present or attempt to present lay witness testimony that Petitioner frequently abused drugs and had an addiction to methamphetamine. The vast majority of the pertinent lay witnesses were either drug dealers or drug abusers. Due to such illegal activity, they would have not been able to testify at sentencing without incriminating themselves about how they were abusing drugs with Petitioner near the time of the crimes. (File doc. 111; Exhibit 31.) Others simply refused to assist Collins. (R.T. 5/15/01, at 108.) A bigger problem for Collins was that the same witnesses had informed him or the police that they had seen Petitioner with John Nabors either immediately before or after the murders occurred. (Id.)

Collins further testified that he had another strategic reason for not presenting expert testimony regarding Petitioner's prior drug use and addiction. He opined that Judge Howe was not likely to give such evidence substantial mitigating weight because there was no record of Petitioner ever seeking help or treatment for his methamphetamine addiction. (R.T. 5/15/01, at 170, 206-11.) Because Collins believed that Petitioner's prior drug abuse and addiction would not be viewed favorably by Judge Howe (R.T. 5/15/01, at 210-11), he did not want to risk Judge Howe concluding that Petitioner was permanently damaged from his drug abuse. (R.T. 5/16/01, at 34.) Collins

speculated that had the sentencing been before a different judge, he might have considered presenting such evidence. (R.T., 5/15/01, at 209-10.)

Discussion

The Court must determine whether Collins was deficient in not presenting witnesses, either lay or expert, on the issue of Petitioner's history of drug abuse or his condition at the time of the crimes. Counsel's decisions regarding sentencing strategy, when based on an adequate inquiry, are generally immune from attack under Strickland. See Gerlaugh v. Stewart, 129 F.3d at 1033. Absent an adequate inquiry, counsel's choices are evaluated for reasonableness, considering all the circumstances. Strickland, 466 U.S. at 690-91.

Voluntary impairment by alcohol or substance abuse may rise to the level of statutory mitigation evidence, A.R.S. § 13-703(G)(1). See State v. Woratzeck, 134 Ariz. 452, 457-58, 657 P.2d 865, 870-71 (1984). However, intoxication to some degree is insufficient by itself to constitute statutory mitigation. Id. A.R.S. § 13-703(G)(1) provides that a statutory mitigating circumstance is only established where the defendant's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."

To satisfy the (G)(1) finding, not only must a defendant's capacity to appreciate wrongfulness or his

ability to conform his conduct be substantially impaired, the impairment must be a contributing cause to the murder. See State v. Brookover, 124 Ariz. 38, 42, 601 P.2d 1322, 1326 (1979); State v. Doss, 116 Ariz. at 163, 568 P.2d at 1061; see also R.T. 5/16/01, at 106-07. The impairment need not be the sole and direct cause of the murder, but there must be some connection tying the impairment to the murder to meet the (G)(1) standard. Doss, 116 Ariz. at 163, 568 P.2d at 1061.

Voluntary impairment by alcohol or substance abuse may also rise to the level of and be considered as non-statutory mitigating evidence. See McMurtrey, 136 Ariz. at 102, 664 P.2d at 646; State v. Watson, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978) (stating that the trial court is to consider any evidence proffered by the defendant tending to show why the death penalty should not be imposed). The trial court considers non-statutory mitigation after finding that it does not qualify as statutory mitigation. See McMurtrey, 136 Ariz. at 102, 664 P.2d at 646. If a defendant's impairment does not rise to the level of a statutory mitigating circumstance, a trial judge considers whether such impairment, when viewed in light of a history of alcohol or drug abuse, constitutes a non-statutory mitigating circumstance. State v. Gallegos, 178 Ariz. 1, 17, 870 P.2d 1097, 114 (1994).

Apart from any probative value in showing intoxication at the time of the offense, a history of substance abuse and addiction may be entitled to some independent non-statutory mitigating weight. State v. Gretzler, 135 Ariz. 42, 57-58, 659 P.2d 1, 15-16 (1983);

State v. Ceja, 126 Ariz. 35, 40, 612 P.2d 491, 496 (1980).

1. Lay Witness Testimony on Statutory Mitigation

The Court does not find Collins deficient regarding the lack of presentation of a statutory mitigating argument for methamphetamine intoxication at the time of the crimes. The Court finds that Petitioner did not discuss or attempt to help Collins come to the conclusion that he was grossly intoxicated by methamphetamine and did not know what he was doing at the time of the crimes. Absent supporting testimony from Petitioner, Collins conducted a thorough investigation into whether lay witness testimony would support a statutory mitigating argument. Because supporting evidence was lacking, Collins did not present witness testimony that petitioner was so intoxicated that he did not know what he was doing at the time of the crimes. Counsel's decision regarding sentencing strategy, when based on an adequate inquiry, are generally immune from attack under Strickland. See Gerlaugh v. Stewart, 129 F.3d at 1033.

2. Drug Expert Testimony on Condition at Time of the Crimes

The Court does not find Collins deficient for failing to present expert testimony in support of a statutory mitigating argument for methamphetamine intoxication at the time of the crimes. Because there was no lay witness testimony to support Petitioner's

intoxication at the time of the crimes, it was reasonable for Collins not to engage an expert. See United States es rel. Kokoraleis v. Director, Illinois Dept. of Corrections, 963 F.Supp. 1473, 1485-86 (N.D. Ill. 1997) If an expert has testified without Petitioner disclosing his condition at the time of the crimes and without other say witness testimony in support of an intoxicated condition, the expert would have been forced to utilize hypothetical supposition regarding Petitioner's condition at the time of the crimes. See id. Such hypothetical supposition would have opened the door for contrary rebuttal argument and reiteration by the prosecution regarding the lack of factual support and incredulity of Petitioner's alleged intoxicated condition at the time of the crimes. Moreover, any expert would have to take into account the underlying facts of the crime which show that Petitioner was involved in deliberative acts, such as planning, conspiring, avoiding detection, and awareness of wrongdoing, and that he was generally oriented to time, place and reality. The lack of factual support of an intoxicated condition, therefore, cut against evidence of mitigation. Due to the inherent lack of credibility of such an argument, Collins reasonably chose not to present expert testimony to Judge Howe regarding Petitioner's condition at the time of the crimes.[30] (R.T. 5/16/01, at 124-26.) See id.; see also

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[30] At the evidentiary hearing, Petitioner presented the testimony of Dawn Day, a felon, who testified that in 1982, two years before the murders, she and Petitioner abused methamphetamine together. By inference, Petitioner sought to prove that he engaged in the same type of drug abuse at the time of the crimes. Regardless of whether the Court would draw such an inference, which the Court declines to do, Petitioner did not prove that Dawn Day was a willing and available witness for Collins to utilize at the 1984 sentencing (Continued)

Siripongs v. Calderon, 133 F.3d 732, 736 (9th Cir. 1998) (reiterating that the relevant inquiry under Strickland is whether the choices made by defense counsel were reasonable).

3. Past Drug Abuse and Drug Addition

Regarding past drug abuse and addiction evidence, besides the presentence report, Collins had an obligation to investigate and evaluate any evidence before making a tactical decision whether he should present additional evidence at sentencing through lay witnesses or expert testimony. In determining whether to present lay witnesses on this issue, the Court fines that Collins not only had to consider whether the lay witnesses had information about Petitioner's past history of drug abuse but also whether such witnesses had inculpatory information regarding Petitioner's commission of the murders. The Court finds that Petitioner did not prove that lay witnesses who did not possess inculpatory information regarding Petitioner and the murders were willing and, available to testify at the time of sentencing. Thus, Petitioner has no demonstrated that Collins unreasonably failed to present lay witness testimony regarding Petitioner's drug abuse at sentencing.

Regarding expert testimony, Collins had an obligation to consider any possible mitigating value of Petitioner's prior drug abuse or addiction to methamphetamine. Thus, Collins had to consider

(Continued).

hearing. See supra page 19.

whether Petitioner and other lay witnesses could provide information to a drug abuse expert so the expert could provide mitigating testimony. However, because an expert must disclose sources relied upon, the Court finds that Collins had to consider that any law witness who provided information to an expert concerning Petitioner's past drug abuse would likely be subjected to cross-examination at sentencing. Furthermore, if Collins had decided to rely entirely upon self-reporting by Petitioner, the value of such self-reporting would have severely limited due to a lack of corroboration and the fact that Petitioner has spent the vast majority of his life incarcerated in prison, not continuously abusing drugs.[31] On the basis of these strategic considerations, the Court finds that Collins reasonably decided not to risk the disclosure of inculpatory information, or an incredibly weak opinion based on Petitioner's self-reporting, by engaging a drug abuse expert to testify at sentencing regarding Petitioner's history of drug abuse. If such an expert had testified, the Court concludes that it is highly likely any lay witness basis for the expert's opinion could have been cross-examined at sentencing and impeached by virtue of the fact that no lay witness could testify that Petitioner was intoxicated at the time of the crimes. Similarly, if an expert had testified bases solely on Petitioner's self-reporting, the Court finds that it is very likely that the expert's opinion would have been severely undermined by undisputed evidence that Petitioner had spent almost 9 of the last

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[31] Considering Petitioner's juvenile and adult incarceration record, for the 9-year period between October 1975 and March 1984, he was incarcerated the entire period, except for 229 days. See infra page 81.

10 years incarcerated with little or no access to drugs. Moreover, the Court finds that it was also reasonable for Collins, pursuant to Arizona law, to consider the facts that Judge Howe was not likely to be largely sympathetic to drug addiction evidence when the addict has not sought treatment.

A history of drug abuse can, in some instances, by considered non-statutory mitigating evidence. See Gretzler, 135 Ariz. 57-58, 659 P.2d at 15-16 (defendant pled guilty to multiple homicides and proffered his history of drug use as mitigating where he had continuously abused drugs for nine years, from the age of 13 until the time of the murders). However, unlike Gretzler, in this case Petitioner maintained his innocence and had not continuously abused drugs due to his incarceration history. The Court finds that Collins reasonable considered both the possibility that residual doubt could favorably impact Petitioner's sentencing and that an inadvertent disclosure of inculpatory information at sentencing would foreclose any remaining question of guilt. See Williams 306 F.3d at 722. Therefore, Collins' strategic decision not to engage an expert to testify at sentencing about Petitioner's pas drug abuse was not deficient.

D. Failure to Obtain and Present Petitioner's Dysfunctional Family History

Petitioner argues that counsel was deficient in failing to conduct an adequate investigation into his social and family history. (File doc. 414, at 69.) Petitioner contends that such an investigation would

have revealed a dysfunctional home environment from which 5 of the 6 children have been incarcerated for various crimes. (Id.) According to Petitioner, counsel's failure to conduct an adequate investigation prevented Collins from learning and presenting evidence of incest, child abuse and religious fanaticism. Petitioner also argues that counsel should have presented witnesses at sentencing to humanize him.

Collins testified that his pre-trial investigation focused both on the guilt and sentencing phases. (R.T. 5/15/01, at 115.) During his investigation, Collins interviewed or attempted to interview Petitioner's family members. Petitioner's mother advised Collins that she would not have anything to do with the investigation. (Id. at 124-25.) Prior to trial, in September 1984, Collins, along with his investigator, traveled to Las Vegas, Nevada, to interview Petitioner's father, Jay Correll, Robin Correll, Tim Correll and family friend, Karen Downey. None of the family witnesses came forward or divulged any information regarding incest, child abuse or religious fanaticism within the family. In addition to general questions, Collins asked the family members to tell him anything and everything that would help Petitioner and make him more sympathetic to the judge. (Id, at 115-29.) The family members volunteered information but advised Collins that Petitioner had been in trouble basically his whole life. (Id. ; see also R.T. 5/16/01, at 74-75 and 6/6/01, at 148.)

Collins testified that he was generally aware of the dysfunctional nature of Petitioner's family but unaware specifically of allegations of child abuse, or

that incest was prevalent in the home, or that the father, prior to Petitioner's sentencing, has been arrested and convicted of child molestation, or that the father's incestuous molestation had been witnessed through a wall heater vent by Petitioner and his brothers whey they were growing up. (R.T. 5/15/01, at 115, 5/16/01, at 33-34, 6/6/01, at 149, 161-62, 176.)

Prior to sentencing, Collins interviewed Sue Curry. Sue Curry knew Petitioner while at the CYA and had maintained contact with him since is departure. Collins requested Mrs. Curry to provide him with any mitigation information. Mrs. Curry discussed with Collins that Petitioner's mother was a Jehovah's Witness and had been given advice to break of communication with Petitioner due to his criminal behavior.

At sentencing, Collins' strategy was not to present Petitioner to Judge Howe as a sociopathic personality who grew up in a dysfunctional family. Collins testified:

> Judge Howe was very aware – in my feeling he was very aware that every – almost every death penalty client comes from a dysfunctional family, so as to all those things that show that he came from a dysfunctional family, I felt Judge Howe had no problem giving the death penalty, even though he came from a dysfunctional family. The fact that these things caused him to become a sociopath, whether it did cause that or it just shows that, okay, he

> was a sociopath, I didn't think the dysfunctional family was going to carry that much weight, if that's what you're asking.

(R.T. 5/16/01, at 47.) Collins did not want Judge Howe to think that Petitioner was permanently damaged psychologically, but rather wanted him to think that the murders were a one-time incident over a drug-deal which went terribly wrong. (Id. at 34.) Collins did present as mitigation that Petitioner's parents abandoned him at the age of 14.

Collins testified that in October 1984, following his conviction, Petitioner became more and more withdrawn and pessimistic because he understood the likelihood that he would receive the death penalty. (Id. at 107-10.) Petitioner told Collins not to continue the sentencing hearing as he wanted to have it over with as soon as possible. (Id.)

In the presentence report, Petitioner's social history was recounted, which included allegations that his parents were strict and administered corporal punishment. (Exhibit 53.) Petitioner also self-reported that his mother was very religious and when he was 14 he was given an ultimatum to either join her church or leave the family.[32] (Id.) Petitioner did not volunteer

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[32] The Court finds this self-report both deceptive and misleading. When Petitioner was 14, he had been already been arrested several times. His parents had provided him with extensive psychological treatment. After another arrest, it appears that his parents allowed him to become a ward of the state. Subsequently, juvenile authorities committed him to Gateways (Continued)

any information to the presentence report author about incest in his family background. Regarding his educational history, Petitioner reported that he had been expelled from the Los Angeles District Schools when he was 14 for pulling a knife on a teacher. (Exhibit 53.)

At the evidentiary hearing, based on Petitioner's self-reporting, Petitioner's psychological expert, Judith Becker, and Sue Curry testified that he suffered physical abuse from his parents. Sue Curry also testified regarding Petitioner's belief that he was abandoned by his family. Additionally, Robin Correll and Patti Correll testified about incest in their family. Patti Correll testified that their father had been arrested and convicted of child molestation. Robin Correll testified that she suffered repeated and continual sexual molestation from both her father and her brothers. Robin specifically identified Petitioner as one who continually molested her. However, none of this information was brought to Collins' attention by anyone, nor were any of theses witnesses available to testify at sentencing.

Discussion

The Court must determine whether Collins's family background investigation was adequate. Petitioner contends that Collins' investigation was inadequate and therefore unreasonable and

(Continued).

mental hospital and then to the CYA. It may be that Petitioner's mother was influenced in the decision to allow him to become a ward of the court due to advice given to her from fellow Jehovah's Witnesses.

constitutionally deficient. Petitioner does not contend that Collins failed to interview his family members but that in those interviews Collis did not obtain and present at sentencing available mitigation information.

At the time of Petitioner's trial, it was established that a difficult family background may be a mitigating circumstance in determining whether a death sentence is appropriate. See Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). In Arizona, a difficult family background, including child abuse, may be relevant mitigation at the penalty phase. See State v. Smith, 138 Ariz. 79, 87, 673 P.2d 17, 25 (1983). However, it is not necessarily entitled to substantial mitigation weight for an adult offender because adults are said to have a greater degree of responsibility for their actions. See Gretzler, 135 Ariz. at 58, 659 P.2d at 16. In Strickland, the Court indicated that "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions." 466 at 691.

1. Incest

At the time of sentencing, the best source of family background information was Petitioner himself. As part of the mitigation investigation, Petitioner was not forthcoming with Collins about incest that had occurred in his family. Moreover, when interviewed, the family members did not disclose any information about the family's incestuous behavior. Petitioner now faults Collins for not finding out about the incest when he interviewed his family members. At the evidentiary hearing, Petitioner chose not to participate or explain

whey he did not aid Collins in this aspect of the mitigation investigation.

Applying a heavy measure of deference to the actions of Collins, the Court does not find that Collins failed to discover information abut an incestuous family history because of a deficient investigation. Rather, this information was unavailable to Collins. Neither Petitioner nor his family members provided Collins with information about incest. See Babbit v. Calderon, 151 F.3d 1170, 1174 (9th Cir.1988) (counsel not ineffective for failing to uncover family history of mental illness where counsel had spoken with family members and friends who might have had such information, but none of them reported any history of illness). Thus, Collins did no fail to complete an investigative lead; rather, Collins was never provided with the information necessary to conduct a more complete investigation. See Jones v. Delo, 56 F.3d 878, 866 (8th Cir. 1995) (concluding that counsel was deficient for failing to interview family members for background information when petitioner did not provide counsel information about his family that would enable counsel to contact them and conduct a fuller investigation).

2. Child Abuse

Next, Petitioner did inform the presentence report author that both of his parents were very strict and had administered corporal punishment upon him. (File doc. 53.) This information was considered at sentencing as part of the presentence report.

Collins testified that Judge Howe was already aware from prior cases that convicted murderers usually have a difficult family history. Collins' sentencing strategy was not to present his client as permanently damaged psychologically, but to present the crimes as an isolated incident in which his client was under the influence of drugs and/or alcohol. (R.T. 5/16/01, at 34.) Consequently, Collins did not further investigate and present any evidence of Petitioner's difficult family history, including allegation of child abuse.

This is a close question. On the one hand, the Court must give deference to a reasonable sentencing strategy. As previously discussed, Collins not only had to consider potential mitigation but also the availability of such evidence. Here, even though Petitioner reported allegations of corporal punishment when he was growing up, none of the other family members were available to corroborate this report at sentencing without also risking the disclosure of inculpatory information or damaging rebuttal information, such as incest that Petitioner had committed. Similarly, Sue Curry was not a reasonably available mitigation witness because she possessed extremely inculpatory information about Petitioner. See supra at 18. While the Court recognizes that a reasonable sentencing strategy must include the presentation of mitigating evidence when counsel faces overwhelming aggravating evidence, the Court concludes that Collins was not deficient in failing to present evidence corroborating the child abuse allegations because such corroborating testimony was not reasonably available to, and thus could not have been obtained by Collins at sentencing. See Douglas,

316 F.3d at 1086.

Moreover, Collins recognizes that even if there had been corroborating evidence of child abuse, it would not be entitled to substantial mitigating weight for an adult offender because adults were said to have a greater degree of responsibility for their actions. See Gretzler, 135 Ariz. at 58, 659 P.2d at 16.

3. Religious Fanaticism

The Court must determine whether Collins' family background investigation was adequate regarding allegations that Petitioner's mother was a religious fanatic. At the evidentiary hearing, Sue Curry, testified that she discussed Petitioner's mother's religious views (Jehovah's Witness) with Collins prior to sentencing. (R.T. 6/8/01, at 511-52.) Curry testified that Mrs. Correll was advised to abandon communication with her son and treat him as dead due to his continuing criminal behavior. (Id.) At sentencing, Collins affirmatively presented that Petitioner was abandoned by his parents when he was 14.

Such performance is not deficient. Collins had the available information regarding Petitioner's mother being a Jehovah's Witness, but chose to present such evidence as an abandonment issue. This was reasonable. See Strickland, 466 U.S. at 690-91.

4. Humanizing Evidence

Finally, Petitioner alleged that Collins should have presented witnesses at sentencing who would have

been able to testify and portray a sympathetic picture of Petitioner to Judge Howe.

At the evidentiary hearing, Petitioner did not present witnesses in support of this allegation, other than Sue Curry. Sue Curry testified that she would have been willing to come and testify for Petitioner at his sentencing in 1984. Before sentencing, Collins had interviewed Sue Curry and was aware that she was willing to testify for Petitioner. In interview notes, however, Collins indicated that Sue Curry had informed him that Petitioner had confessed to her the murders in Phoenix for which he had been convicted. (Exhibit 34.) Based on this fact, Collins was not deficient in not presenting Sue Curry as a mitigation witness.[33] Similarly, Collins was not deficient in not contacting and presenting Rev. Robert Curry as a humanizing mitigation witness because Rev. Curry would have refused to testify on behalf of Petitioner. (R.T. 6/8/01, at 102-03; see supra page 19.) Terry Correll was not available as a humanizing witness because Petitioner had accused him of committing the crimes. Robin and Tim Correll, Karen Downey and Carol Helton were not available as mitigation witnesses because all of them had inculpatory

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[33] At this evidentiary hearing, Sue Curry testified that Petitioner had confessed to her about little things, but had not actually given her a full confession. (R.T. 6/8/01, at 50-59.) The Court does not find Sue Curry credible on this point. Collins' notes reflect numerous occasions where she informed him that Petitioner had confessed his guilt to her for the Phoenix murders. (Exhibit 34.) Curry was surprised when Collins informed her that Petitioner had not confessed his guilt to him. (Id.)

information about Petitioner committing the crimes. Petitioner's father, Emerson Correll, had been convicted of child molestation. Petitioner's mother, Joyce Correll, did not want to be involved. Patti Correll was too young to remember Petitioner prior to his moving out. Patricia Malone was not available as she was a prosecution witness and testified against Petitioner at trial. In short, Collins was not deficient. It was reasonable for Collins to not present family or friend testimony at sentencing given the availability of powerful rebuttal evidence and the unavailability of several of the humanizing witnesses to testify. Petitioner has not proved the existence of any other person who was available and willing to present humanizing evidence about him at sentencing.

V. PREJUDICE

Under the legal standards previously reviewed, the Court has narrowly determined that counsel was deficient in only two sentencing phase aspects. Therefore, the Court turns to consider whether Petitioner suffered Strickland prejudice from counsel's deficient performance. That is, whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. In this context, the Court considers what additional mitigation evidence existed and could have been presented at sentencing. See Douglas v. Woodford, 316 F.3d at 1086, 1089. Evidence and testimony from the evidentiary hearing that Petitioner has shown could

have been obtained and presented at sentencing will be considered along with the mitigating evidence already considered by the state court to determine whether an impartial sentencer would conclude that prejudice has been established.[34]

In aid of an assessment of prejudice, Strickland holds that a sentencing verdict that is supported with overwhelming record support is not as likely to be affected by errors as one only weakly supported by the record. Id. at 695-96. To establish prejudice, the additional mitigation evidence must do more than barely alter the sentencing profile already presented to the sentencing judge. Id. at 699-700. In Bernard Smith the Ninth Circuit described the habeas court's function in assessing prejudice, as follows:

> In assessing prejudice in a case like this one, we are presented with a particularly difficult practical and jurisprudential question because we are not asked to imagine what the effect of certain testimony would have been upon us personally. We are asked to imagine what the effect might have been upon a sentencing judge, who was following the law, especially one who had heard the testimony at trial. Mitigating evidence might well have one effect on the sentencing judge, without having the same effect on a different judicial officer.

Smith (Bernard), 140 F.3d at 1270. Thus this Court

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[34] See supra page 19.

must interpret Arizona law regarding the weighing of aggravating and mitigating circumstances before it may properly determine whether the result of the sentencing proceeding would have been different. See id. at 1271 (evaluating the weight of mitigating circumstances under Arizona law in assessing whether petitioner was prejudiced at sentencing).

At the time of sentencing, Arizona's death penalty statute required a judge to order a death sentence if one aggravating circumstance was proven beyond a reasonable doubt and there were no mitigating circumstances sufficiently substantial to call for leniency. A.R.S. § 13-703(E).[35] In this case, the

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[35] In Ring v. Arizona, 122 S. Ct. 2428 (2002), the Supreme Court found this aspect of Arizona's statutory scheme for imposing the death penalty unconstitutional. The Court held that Arizona's method of allowing a judge sitting without a jury to find an aggravating factor necessary for imposition of the death penalty violates the Sixth Amendment. The Ring decision was based on Apprendi v. New Jersey, 530 U.S. 466 (2000), and expressly overruled Walton v. Arizona, 497 U.S. 639 (1990), in which the Court had previously upheld the constitutionality of Arizona's judge-only capital sentencing scheme.

Because Ring v. Arizona was a direct review case, it did not immediately reverse the sentence of those, like Petitioner, whose cases were already final at the time of decision. See Griffith v. Kentucky, 479 U.S. 314 (1987) (Citing Teague v. Lane, 489 U.S. 288 (1989), for the proposition that new constitutional rules of criminal procedure are not applicable to those cases which were final before the new rules are announced).

Currently, the Ninth Circuit has pending the issue of whether there is an available exception to Teague that would provide retroactive relief to Arizona death-row prisoners whose convictions

(Continued)

prosecution proved three aggravating circumstances: previous conviction of a felony involving the use or threat of violence, receipt or expectation of pecuniary value, and committing the murders in an especially cruel, heinous or depraved manner.[36] Regarding the first aggravating circumstance, previous conviction for a felony involving the use or threat of violence, the record demonstrated that at the time of the murders, Petitioner was on parole for robbery. Correll, 148 Ariz. at 478, 715 P.2d at 731. Petitioner had previously been convicted in 1978 in California on three counts of robbery. (State R.T. 11/23/84.) On one of those counts, he received an enhanced sentence for use of a firearm in committing the robbery.[37] Correll, 148 Ariz. at 479,

(Continued).

were already final at the time of Ring. Summerlin v. Stewart, No. 98-99002, 310 F.3d 1221 (9th Cir. 2002) (order rehearing case enbanc).

In State v. Towery, No CT-02-0031-PC, 2003 WL 54386 (Ariz. Feb. 26, 2003), the Arizona Supreme Court determined that Ring v. Arizona does not provide retroactive relief to Arizona death-row prisoners whose convictions are already final at the time State v. Ring, 200 Ariz. 25 P.3d 1139 (2001) was decided.

[36] The trial court found a fourth aggravating circumstance, multiple homicides committed during the offense. This was invalidated because the statute was only in effect at the time of sentencing, not when Petitioner committed the murders. See Correll, 148 Ariz. at 481-82, 715 P.2d at 734-35 (construing A.R.S. § 13-703(F) (8)).

[37] The facts of Petitioner's 1978 conviction were as follows: Petitioner and his 13-year-old younger brother entered a convenience store. Petitioner held the clerk at gunpoint and robbed the store of approximately $600. Later that night, (Continued)

715 P.2d at 73. Finally, the Arizona Supreme Court determined that the murders were committed in an especially cruel and heinous manner, based on the following findings of fact:

> Snelling, Cady and D'Brito must have been in great fear about their ultimate fate. Nabors had a gun, which he often lent to defendant, and additionally, defendant armed himself with a kitchen knife. Each victim was bound with duct tape, and this occurrence must have caused each victim great distress. This fear and worry must have greatly increased when they were loaded into Cady's car and driven into the desert. At no time could they be certain what these two armed men intended beyond robbery. In the desert, each victim was laid on the ground. Snelling was shot first, D'Brito was second, and then Cady was shot last. Therefore, Cady and D'Brito both witnessed the shooting of Snelling and must have realized they would be next. Cady further suffered because the gun misfired a couple of times before Nabors succeeded in killing her. Hence, we find defendant committed the murders of Cady and D'Brito cruelly.

Id. at 480-81; 715 P.2d at 732-33. Petitioner received two death sentences: one for the murder of Cady, and one for the murder of D'Brito.

(Continued).

Petitioner and his 15-year-old girlfriend robbed two more convenience stores. Petitioner stated that he was not intoxicated when he committed the robberies; he committed the robberies so that he could buy a car, which he did that night. Petitioner also stated that committing the offenses gave him a strong sense of power and excitement. (Exhibit 9, 71, 74 and 75.)

The Court recognize the horrific facts surrounding the robbery and "execution style" murder of the two victims. See Woodford v. Visciotti, 123 S. Ct. 357, 361 (2002) (per curiam) (noting the overwhelming nature of the aggravation involved in "execution style" murders in the course of a pre-planned armed robbery). Additionally, the Court recognizes Petitioner's criminal history prior to committing these murders, which resulted in the finding of the (F)(2) aggravating circumstance. (See Exhibit 9.)

Based on both the horrific facts surrounding these murders and Petitioner's prior criminal history,[38] this is the type of case that demands powerful mitigation before it may be said that confidence in the outcome at sentencing has been undermined. See Bonin v. Calderon, 59 F.3d at 815, 836 (9th Cir. 1995); see also Gerlaugh v. Stewart, 129 F.3d 1027, 1042-43 (9th Cir. 1997) (horrific crime facts require substantial mitigation before it may be said that the balance of aggravating factors did not warrant death); Campbell, 829 F.2d at 1464 (overwhelming aggravating factors and the heinous nature of the crime require more than insubstantial mitigation to establish prejudice).

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[38] In Landrigan v. Stewart, 272 F.3d 1221, 1228 (9th Cir. 2001), the court held that if the defendant's past criminal history proved that he was exceptionally unscrupulous, exceptionally lacking in regard for others, and exceptionally lacking in morals, the mitigation to establish prejudice must be substantial even though the murder is not an above-the-norm first degree murder.

Petitioner's past criminal history aptly demonstrates that he is exceptionally lacking in regard for others and is exceptionally unscrupulous.

A. Psychological Mental Health Evidence

At the evidentiary hearing, additional mental health evidence and background information was considered along with information previously obtained and presented at sentencing. A summary of Petitioner's mental health information includes the following facts.

When Petitioner was in eighth grade, he pulled a knife and threatened a teacher at school and was expelled. (Exhibits 22, 53, 55 and 71.) Petitioner's parents took him to a private psychologist and he continued to see this psychologist for some period of time. His mother and father were also seen as part of his treatment program. (Exhibit 22, at 3.) He did not recall how long the psychologist treated him. He was not placed on any medication.

Hospital admission records from Gateways confirm that in 1974, Petitioner was admitted to Gateways for a 3-month period. (Exhibit 3.)[39] Petitioner's admitting diagnosis code was 307.2, which at the relevant time period referred to the Diagnostic and Statistical Manual of Mental Disorders, Second Edition (DSM II). Under DSM II, 307.2 is transient situational disturbance, specifically an adjustment reaction of adolescents to overwhelming environmental stress.

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[39] Petitioner's presentence report indicated that the Juvenile Court in Los Angeles ordered him committed to Gateways after being arrested on a charge of assault with a deadly weapon. (Exhibit 53.)

(Exhibit 127; R.T. 11/7/01, at 64-64.) This diagnosis is not a major psychological disorder. (Id.) Petitioner self-reported to Dr. Becker that at Gateways he was diagnosed with depression or manic depression, but he was not given any medication.[40] (Exhibit 22, at 3.)

In 1975, following his initial commitment to Gateways, Petitioner attended and finished the second semester of 9th grade at Camp Scott. (Exhibit 8.) During this period, Petitioner alleges that he was given Mellaril, 25 milligrams (mg) per dose, at a group home in Englewood, California.[41] He escaped from this facility, was apprehended, and recommitted to Gateways by the Juvenile Court.

In September 1975, Petitioner was readmitted to Gateway for a brief 8-day period. (Exhibit 3.) During this 8-day commitment, Petitioner was undergoing treatment when he assaulted and raped a psychotic female patient and was removed from this program. (See Exhibit 71.) He was not given any medication during this commitment. (File doc. 22, at 4.)

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[40] Petitioner has never testified to this information. As this Court has already noted, Petitioner's self-reporting is subject to searching skepticism due to his motive to fabricate information in his interest and the lack of any other evidence supporting his self-reports. See supra page 32 n.24. State v. Medrano, 185 Ariz. at 194, 914 P.2d at 227.

[41] Dr. John Scialli, M.D., Respondents' mental health expert, testified without dispute that a prescribed dosage of 25 mg of Mellaril is not a prescription to counteract a psychosis, but a mild tranquilizer. A prescription of 625 mg would be an intermediate dosage utilized to counter act a psychosis. (R.T. 11/7/01, at 58.)

In October 1975, in an escape attempt from Wayside Honor Ranch, Petitioner and an accomplice held several hostages with a butcher knife and a letter opener.[42] (Exhibit 71.) Petitioner was arrested on 3 counts of assault with a deadly weapon, 2 counts of false imprisonment and 1 count of burglary. (Id.) Following his arrest, Petitioner states that he was placed in a "very locked down juvenile facility" and allegedly given Haldol and Cogentin to treat his mental health. (File doc. 22, at 4.)

At the hearing, it was undisputed that Haldol and Cogentin are anti-psychotic medications. Both Dr. Becker and Respondents' expert, Dr. Scialli, reviewed Petitioner's medical records from the CDOC and noted the absence of Mellaril, Haldol and Cogentin as medications prescribed to Petitioner for his mental health. See R.T. 10/4/01, at 128-36 (Becker); 11/7/01, at 54-59, 63-59 (Scialli). Further, both experts testified that it is standard practice and part of their own practice to note in mental health reports whether they prescribed any medications for the patient's treatment. (Id.) Based on this evidence and testimony, the Court finds no evidence that CDOC personnel prescribed Mellaril, Haldol and Cogentin during the time of Petitioner's incarceration as an adult.

The Court concludes, based on expert testimony, that major mental illnesses are chronic and do not respond without continuing mental health treatment. (See, e.g., R.T. 11/7/01, at 53, 10/4/01, at 137-38.)

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[42] One of the victims of Petitioner's assault suffered a heart attack during the crime.

Therefore, because Petitioner did not have a major mental illness when he was turned over to CDOC at age 18, the Court concludes that Petitioner did not have a major mental illness as a juvenile and did not need to be continually treated with anti-psychotic medication. (See Exhibit 72.)

In 1978, after Petitioner pled guilty to two counts of armed robbery and one count of robbery, the Superior Court in Sacramento, California, committed Petitioner to CDOC's Medical Facility at Vacaville for the purpose of a diagnostic psychological evaluation. (Exhibits 53, 72, 74.) At Vacaville,[43] Petitioner was evaluated by Psychologist E.S. Birkman, who concluded that Petitioner had an antisocial personality disorder. (Id., Exhibit 72.) Also at Vacaville, a social history was performed by D. Miller. The social evaluation indicated that Petitioner appeared mildly depressed. The report recounted some of Petitioner's psychiatric history, including a 1976 psychological report where he was described as severely psychologically impaired.[44] (Exhibit 71.) The social evaluation concluded that Petitioner was not a candidate for probation because he would not successfully complete the probation program. Based on his destructive behavior and the nature of his

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[43] The Vacaville reports disclosed possible suicide attempts by Petitioner as a juvenile.

[44] Petitioner's psychological impairment in 1976 did not result in a major mental illness. Dr. Birkman determined in 1978 that Petitioner did not have a major psychological illness. (See Exhibit 72.)

offenses, the evaluation also concluded that Petitioner was a danger to the community. (Id.; see also Exhibit 74 at 4.)

At the evidentiary hearing, Petitioner presented expert psychological testimony from Dr. Judith Becker, a clinical psychologist. Dr. Becker personally examined and evaluated Petitioner. Dr. Becker testified that Petitioner presently suffers from mild depression, not a major mental illness. (R.T. 10/4/01, at 86, 137-38.) Based on Petitioner's mental health history, Dr. Becker testified that Petitioner is properly diagnosed as having an antisocial personality disorder. (R.T, 10/4/01, at 167-68.) Regarding any additional mental health diagnosis, Dr. Becker testified that Petitioner may have suffered post-traumatic stress disorder (PTSD) arising from the emotional and physical abuse and neglect he suffered as a child, but indicated that this was on a possibility.[45] (R.T.

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[45] Although Dr. Becker testified that Petitioner's emotional and mental problems might have contributed to the commission of the crime, Dr. Becker did not identify a specific mental problem or explain why she believed that a mental condition might have contributed to the crime. Dr. Becker only generally asserted that Petitioner's emotional and mental condition might have contributed to the commission of the crime and did not tie the facts of the crime to Petitioner's background. (R.T. 10/4/01, at 116-17.) The Court does not find Dr. Becker credible on this point. She supported this general opinion with allegations regarding his dysfunctional family history. Such allegations are considered infra at page 94, where the Court concludes that most of the allegations utilized in support of Dr. Becker's opinion are neither accurate nor reliable. Moreover, Dr. Becker's testimony and opinion is doubled-edged in nature because if she had testified
(Continued)

10/4/011, at 161.)

Respondents presented expert mental health testimony from Dr. John Scialli, M.D. Prior to his testimony, Dr. Scialli and Dr. John Moran personally evaluated Petitioner and diagnosed him as suffering from an antisocial personality disorder and a self-reported addition to methamphetamine. (Exhibit 205.)

Dr. Scialli disagreed with Dr. Becker regarding any causal effect at the time of the crime that Petitioner's antisocial personality disorder had upon his ability to control his actions. The Court credits Dr. Scialli's testimony that even though Petitioner had an antisocial personality disorder, he was able to conform his behavior to the requirements of law on the night of the crime and appreciated the wrongfulness of his conduct. (R.T. 11/7/01, at 31-33.) Dr. Scialli explained his testimony:

> [Antisocial personality disorder] doesn't influence the ability to control thoughts and actions, rather it influences choices that people make and what their personal priorities are and how they go about thinking of their actions. In terms of influencing the actions directly, it does not have that power.

(R.T. 11/7/01, at 32.)

Dr. Scialli further disagreed about any possibility of

(Continued).

about Petitioner living in an incest-ridden house, it would have opened the door to extremely damaging rebuttal testimony that Petitioner regularly participated in the incest by sexually molesting his sister Robin.

a diagnosis of PTSD. Dr. Scialli concluded that there was no evidence that Petitioner ever had this disorder. (R.T. 11/7/01, at 73, see also R.T. 6/6/01, at 115.) Further, Dr. Scialli concluded that there was no evidence of a present or past major depressive disorder, manic depression or dipolar disorder. (R.T. 11/7/01, at 34, 73.) This conclusion was supported by the testimony of Respondents' neurophysiologist, Dr. Daniel Martell. Dr. Martell testified that there was no evidence that Petitioner suffered from PTSD, bipolar disorder or a major depressive disorder. (R.T. 11/6/01, at 36-40.)

The Court specifically finds that there is insufficient evidence to support that Petitioner has ever suffered from any major mental illness, whether PTSD, a major depressive disorder, or a bipolar disorder. The Court credits the testimony and conclusions of Drs. Moran, Scialli and Martell. The Court does not credit Dr. Becker's speculative diagnosis of PTSD because she as convincingly impeached regarding her possible diagnosis of PTSD. (R.T. 10/4/01, at 161-62.) The Court further finds that Petitioner does suffer from a mild depressive disorder and that he has an antisocial personality disorder.

Quite apart from his testimony as an attorney expert, Attorney Tim Ford speculated that Petitioner's antisocial personality disorder contributed to the murders that Petitioner committed. (R.T. 10/24/01, at 173.) The Court finds Mr. Ford's opinions are not credible on this point and gives no weight to his testimony regarding Petitioner's personality disorder. Besides the fact that Mr. Ford is not a medical

professional and has no expertise to declare a connection between these crimes and Petitioner's antisocial personality disorder, Mr. Ford testified to this conclusion without personal knowledge.[46] Further, none of the psychological experts opined that there was specific causal connection between Petitioner's personality disorder and the crimes.

Discussion

Petitioner established a history of mental health commitments to psychological facilities when he was minor. As an adult, Petitioner continued to have some contact with psychologists while incarcerated at CDOC. Petitioner has been diagnosed with and currently has an antisocial personality disorder and mild depression, neither of which are major psychological disorders.

Arizona recognizes that an antisocial personality disorder may have some mitigating value. However, personality disorders do not rise to the level of a statutory mitigating factor under A.R.S. § 13-703(G)(1). See State v. McMurtrey, 1136 Ariz. at 102, 664 P.2d at 646; State v. Vickers, 129 Ariz. 506, 515, 633 P.2d 315,324 (1981); State v. Richmond, 114 Ariz. at 197-98, 560 P.2d at 51-52. Personality disorders are evaluated as non-statutory mitigating evidence; such disorders are only entitled to meaningful weight if the disorder significantly impaired the defendant's capacity or significantly influenced his behavior at the

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[46] Mr. Ford did not personally interview Petitioner.

time of the crime. See Vickers, 129 Ariz. at 516, 633 P.2d at 326; see also State v. Hoskins, 199 Ariz. 127, 152, 14 P.3d 997, 1022 (2000) (stating that if defendant's personality disorder leads reasonable experts to conclude that the disorder had a causal connection with the commission of the crime, then significant mitigation is established).[47]

Petitioner's psychological evidence is not entitled to substantial weight. There is no credible evidence that Petitioner's personality disorder of his mild depression impaired his capacity or significantly influenced his behavior at the time he committed the crimes. (R.T. 11/7/01, at 31-33.) Petitioner's motive for the crimes was robbery and elimination of witnesses; his

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[47] Regarding personality disorders and a dysfunctional family history, Arizona has determined that such evidence is entitled to significant mitigating weight only if such mitigation has a causal connection to the offense-related conduct. See State v. Stuard, 176 Ariz. 589, 608 n.12, 863 P.2d 881, 900, n.12 (19913). Arizona has rejected the argument that such a standard violates U.S. Supreme Court precedent in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddigns v. Oklahoma, 55 U.S. 104 (1982). See State v. Dierf, 191 Ariz. 583, 598, 959 P.2d 1274, 1289 (1998). Both Lockett and Eddings require that the trial judge consider all relevant mitigating evidence proffered by the capital defendant. Accordingly, Arizona requires the trial judge to consider all evidence proffered for mitigation, but allows the sentencer to give it the weight it deserves. Dierf, 191 Ariz. at 598, 959 P.2d at 1289; State v. Towery, 186 Ariz. 168, 189, 920 P.2d 290, 331 (1996) (summarizing the Lockett/Eddings standard and holding that the sentencer must give proffered mitigating evidence weight that reflects a reasoned moral response to the evidence. However, the sentencer retains the discretion to determine how much weight should be given such evidence).

antisocial personality disorder was not a major factor in the commission of the crimes. The evidence shows pre-planning and calculation rather than an impulsive act of Petitioner. Robin Correll informed Collins' investigator shortly after the crimes that she knew something was going to happen because they (Terry, Tim and Robin Correll) needed money for rent and for drugs. She believed that Petitioner would rob someone to get the money they needed. (See Exhibit 31, Robin Correll interview, 9/18/84.)

The Court determines that Petitioner's mental health mitigation evidence is not entitled to significant mitigating weight, however, it is entitled to some de minimis weight. Because Petitioner's antisocial personality disorder is entitled to only some de minimis weight, the lack of presentation of such de minimis evidence did not result in prejudice to Petitioner at sentencing. Additionally, any evaluation by this Court of potential prejudice is eclipsed by the overwhelming rebuttal evidence of specific bad acts of an aggravating nature.

The rebuttal evidence presented demonstrates that while Petitioner was committed to Gateways and undergoing mental health treatment, he raped a female psychotic patient. While such behavior may be indicative of his personality disorder, such behavior also demonstrates a complete disregard for an opportunity for mental health treatment, and a decision instead to continue to engage in violent assaultive behavior. Petitioner's CDOC records further demonstrate that Petitioner escaped numerous times from DCOC mental health treatment facilities.

(Exhibit 9.) During one such escape attempt, Petitioner took hostages by the use of a butcher knife and letter opener, which resulted in one of the hostages having a heart attack. Thus, on numerous occasions, Petitioner turned down institutional effort to provide him with mental health treatment.

Finally, Miller's conclusion that Petitioner was a danger to the community may be reasonably interpreted as a warning from Miller not to provide early release for Petitioner because he was extremely dangerous. (Exhibit 71.)

B. Neuropsychological Evidence

Petitioner submitted medical records from the Childrens' Hospital of Los Angeles arising out of a head injury he suffered at the age of 7 when a block wall fell on top of him and hit his head. (Exhibit 4; see also Exhibit 55.) Further, Petitioner reported that he was unconscious for a few minutes but remembers a neighbor carrying him into his house. (Exhibit 20, at 2.) Approximately one week later, he reported that his parents took him to an emergency clinic where he alleges that he was diagnosed with a hairline fracture. (Exhibit 22, at 5.)

Based on the testimony and records submitted at the evidentiary hearing, the Court finds the following facts. Petitioner received a head injury on April 8, 1967, when he was 7, at which time his parents took him to see their family doctor. (See R.T. 11/7/01, at 41-49; Exhibit 4.) Four days later, Petitioner was vomiting and again taken to the family doctor where an x-ray was taken and an EEG scheduled. (Id.) On

April 14, 1967, an EEG was done. On April 15, in response to more vomiting, Petitioner's parents took him to the emergency room at Children's Hospital of Los Angeles. (Id.) At the hospital, he was seen by a treating physician, who diagnosed a subgaleal hematoma, which is a bruise or collection of blood under the scalp, but above the skull. (Id.) The treating physician recommended a neurosurgery consultation which was done. (Id.) On May 3, 1967, Petitioner was brought back to the neurosurgery clinic for a follow up visit. The follow-up visit note that Petitioner's hematoma cleared in 5 days and that Petitioner was alert and well. (Id.)

Dr. Anne Herring, Petitioner's neurophysiologist, performed neuropsychological testing upon Petitioner to assess his cognitive functioning and whether he has any brain injury. (Exhibit 20.) For the vast majority of tests (30 out of 33 tests), Petitioner's scores were average to high average. (R.T. 10/4/01, at 67.) Dr. Herring identified 3 tests where Petitioner had difficulty. Dr. Herring opined that Petitioner had severe difficulty on one test measuring his central information processing capacity. (Id. at 70-71.) Based on her testing, Dr. Herring testified that Petitioner's performance suggests some degree of brain dysfunction and problems with impulse control. (Id. at 35-36.) Dr. Herring further opined that Petitioner's history of dysfunctional behavior suggests a possibility of prefrontal lobe brain impairment. Finally, she noted that his dysfunctional behavior is exacerbated by the ingestion of recreational drugs and alcohol. (Exhibit 20.)

Respondents presented a report and testimony from Dr. Daniel Martell, a neurophysiologist. Dr. Martell tested Petitioner after Dr. Herring and had the benefit of her report. Dr. Martell focused his testing on assessing areas of possible impairment, Petitioner's visual perceptual skills, his visual memory and executive functioning. (Exhibit 211, at 4; R.T. 11/6/01, at 13-14.) Dr. Martell concluded that there is evidence that Petitioner has isolated neuropsychological impairments or deficits characterized by mild impulsivity and difficulty with selective attention. (Id. at 5.) However, those isolated impairments did not generalized to Petitioner's overall ability to organize, plan and control his behavior. (Id.) Regarding his frontal lobe ability, Dr. Martell testified that there is significant variability. In some areas he is "absolutely genius" and in others average to above average, and in still another there is mild to moderate deficit. (R.T. 11/601, at 33-34.) Overall, Dr. Martell characterized Petitioner as only having very mild impairment and that of all the capital defendants he has tested, Petitioner is one of the highest functioning defendants. (R.T. 11/06/01, at 69.) The Court requested clarification, and asked how it should view a finding of mildly brain impaired. (R.T. 6-11-0, at 71.) Martel opined that "it's a very minor finding."

> If you were his doctor, you wouldn't notice it unless you sent him for this kind of specialized testing. It's a very specific deficit that doesn't have a lot of import for his everyday behavior, and it's seen in the context of otherwise normal to superior functioning.

(Id. at 71.)

Based on testimony received from neurophysiologists, the Court concludes that Petitioner did not suffer any brain injury from the block wall that fell on him when he was 7 years old. The Court specifically finds that Petitioner does suffer from some mild brain impairment or deficit. The Court adopts Dr. Matell's finding that it is a minor impairment and does not generalize to Petitioner's overall ability to organize, plan and control his behavior. (R.T. 11/6/01, at 71.) The Court further adopts the finding of Dr. Martell that, when subjected to neuropsychological testing, most everyone suffers some level of deficit or impairment. (R.T. 11/6/01, at 42-43.) The Court is unable to determine the origin of Petitioner's mild impairment. Petitioner did not demonstrate any brain damage or that his mild brain deficit or impairment was a factor in the murders.

Discussion

Petitioner did have a head injury when he was 7 years old and he does suffer from some mild brain deficit. However, as testified by Dr. Martell, most everyone suffers some level of deficit or impairment when subjected to neuropsychological testing. Such a mild deficit does not mean that Petitioner is not a highly functioning adult. In fact, he is a highly functioning adult. The Court has already found that any neuropsychological impairment was not a factor in the murders.

Petitioner is not a slow, dull, brain-damaged defendant whose judgment and rationality are

marginal. See State v. Ceja, 126 Ariz. at 40, 612 P.2d at 496. Neither does Petitioner have some neuropsychological condition that adversely affects his ability to control his conduct. See State v. Doss, 116 Ariz. at 1163, 568 P.2d at 1061. Consequently, there is little, if any, mitigating effect from Petitioner's neuropsychological condition. The facts of the crime certainly demonstrated the ability of Petitioner to control his conduct at the time of the murders, and Petitioner did not prove otherwise. (R.T. 10./3/01, at 117-36.)

Although Petitioner's neuropsychological conditions is entitled to some de minimis weight, the lack of presentation of such de minimis evidence did not result in prejudice to Petitioner at sentencing. Additionally, any evaluator by this Court of potential prejudice is eclipsed by the overwhelming evidence of specific bad acts of an aggravating nature. See supra at page 74-73.

C. Condition at Time of the Crimes/Substance Abuse

The Court found that Collins was not deficient in deciding not to present lay or expert witnesses on the issue of Petitioner's history of drug abuse or his condition at the time of the crimes. See supra at page 43 to 49. However, assuming arguendo that Collins' performance in this respect was deficient, the Court considers whether such performance prejudiced Petitioner at sentencing. At the evidentiary hearing, the parties litigated whether Petitioner was impaired by drug and/or alcohol abuse when he committed the crimes and his history of substance abuse.

1. Condition at Time of the Crimes

Petitioner would not provide specific information about his condition at the time of the crimes because of his continuing insistence that he was not involved in the crimes. (See, e.g., Exhibit 213, at 4.) In his interviews with medical and substance abuse experts, Petitioner reported general information about his use of drugs prior to when the crimes occurred.

At the evidentiary hearing, Robin Correll testified that the morning before the crimes occurred (April 11), she witnessed Petitioner and her brother Terry Correll inject some amount of methamphetamine. (R.T. 6/6/01, at 159-60.) Later that night (early the next day), she testified that Petitioner and John Nabors woke her up and informed her that they needed a ride out-of-state right away. (Id. at 160.)

The Court credits Collins' testimony that he interviewed the persons who were with Petitioner at or about the time of the murders and they attested that Petitioner was using methamphetamine prior to the crimes, but could not verify that he was grossly intoxicated by methamphetamine and did not know what he was doing the day before the crimes were committed. (R.T. 5/16/0, at 68-72.) Collins' testimony about Petitioner not only being grossly intoxicated by methamphetamine the day before the crimes were committed is corroborated by the fact that when Petitioner and John Nabors gained entry into the trailer home, the first thing Nabors asked Guy Snelling was whether he had any speed. (R.T. 5/15/0, at 217.) Based on these facts, the Court infers that at the time they entered the trailer neither Nabors nor Petitioner

were fully supplied with amphetamines or methamphetamine.

Petitioner obtained an expert in drug addiction, Dr. C. J. Shaw, and a toxicology expert Dr. John Sullivan, to evaluate whether his drug usage at the time of the murders may have influenced his behavior. . Dr. Sullivan did not examine Petitioner nor did he look at Petitioner's Arizona Department of Corrections or CDOC records. (R.T. 10/24/01, at 7-9.) Rather, Dr. Sullivan was asked to assume that Petitioner was 24 at the time of the crimes; that he had abused drugs since the age of 10 or 12 and was an addict by 14; that during the course of his life, he used LSD, PCP, cocaine, heroin, methamphetamine, and alcohol and that his drug of choice was methamphetamine; that Petitioner has used methamphetamine for days on end, going on protracted binges until the point where no amount of the drug would keep him high, then crashing and sleeping for days; that he has reported periodic and visual hallucinations while high on methamphetamine; that during the two weeks prior to the crime, he injected methamphetamine up to six times every day prior to the crime and was several days sleep deprived as a result of this binge. (See Exhibit 18.) Based on these assumptions, Dr. Sullivan described the possible effects of chronic methamphetamine abuse upon a person's behavior, including sudden violent outbursts, episodes of violence and other aggressive act. (Id.)

At the hearing, Respondents credibly proved that when you take into account Petitioner's juvenile and adult incarceration record, for the 9-year period

between October 1975 and March 1984, he was incarcerated the entire period, except for 229 days. R.T. 10/33/01, at 93-97.) Further, Respondents credibly established that Petitioner was not a methamphetamine addict or a long-term abuser of methamphetamine during the time that he was incarcerated, from October 1975 to March 1984. Thus, the hypothetical facts provided to Dr. Sullivan do not accurately or reliably portray Petitioner's alleged drug abuse during his incarceration. The Court specifically finds that Petitioner was not a chronic methamphetamine abuser during his incarceration.

Next, the hypothetical facts assume that Petitioner ingested a certain amount of methamphetamine every day for a two-week period prior to the murders. In support, Petitioner would have the Court rely on his own general self-report. The Court finds Petitioner's general self-report to Dr. Shaw both unsubstantiated and unreliable. See infra page 82. Consequently, the Court gives no weight to Dr. Sullivan's report or testimony because it was based on unsubstantiated and unreliable factual assumptions. Moreover, it is noted that even taking into account these unreliable factual assumptions, Dr. Sullivan did not render a medical opinion about whether methamphetamine abuse affected Petitioner in 1984. (R.T. 10/24/01, at 9.)

Dr. Sullivan further testified that with brain imaging studies, specific brain pathology can be identified. (R.T. 10/24/01, at 18-19.) The Court previously denied Petitioner's motion for such testing, as there was no showing that such testing was available to Collins in 1984.

Turning to Dr. Shaw, Petitioner self-reported that he was paroled from prison on March 3, 1984, and allegedly used methamphetamine every day between the time of his parole and the date when the murders occurred. (Exhibit 25, at 3.) Petitioner further alleged that typically, he would go on 3-to 5-day binges, after which he would sleep continuously for 1 to 2 days. (Id.)

The Court does not credit Petitioner's unsubstantiated self-report that he abused methamphetamine every day before the crimes were committed. Petitioner chose not to testify at the evidentiary hearing; Petitioner chose not to fully cooperate with Dr. Matthews' examination of him regarding the issue of drug abuse (Exhibit 213, Examination Notes.) Because of the obvious motive to fabricate, Petitioner's self-serving statements about his drug usage prior to the crimes is unreliable and subject to searching skepticism. See, e.g., Medrano, 185 Ariz. at 194, 914 P.2d at 227; see also Bernard Smith, 140 F.3d at 1270 (evaluating evidence based on impartial sentencing judge applying Arizona law); see generally, Strickland, 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). The Court's searching skepticism toward Petitioner's self report is corroborated by Respondent's drug abuse expert, Dr. Matthews, who opined as follows: "Antisocial personality disorder is characterized by malingering and deceit; instances of [Petitioner's] lifelong pattern of deceptiveness abound throughout his penal and other records. He has been deceitful about a great many matters, including his

history of substance abuse. Because of [Petitioner's] history of deceit, it is a major clinical error to accept [Petitioner's] self-serving view of his condition at the time of the offense as accurate." (Exhibit 213, at 2.)

Based on Collin's testimony, it appears that Petitioner may have abused some unknown amount of methamphetamine on the days prior to April 11, 1984. However, at the evidentiary hearing, Petitioner did not prove such usage. See Williams v. Calderon, 41 F.Supp.2d 1043, 1058 (C.D. Cal. 1998) (noting that where there is no evidence available which would absolutely document the fact that petitioner was abusing a certain amount of drugs at a certain time, conclusions about actual effect of drugs on the petitioner can only be drawn by considering his behavior at the time of the crimes), aff'd Williams v. Woodford, 306 F.3d 665 (9th Cir. 2002).

For the day before the crimes, the Court credits Robin Correll's testimony that she witnessed Petitioner inject himself with methamphetamine in the morning. However, her failure to testify at sentencing was not prejudicial to Petitioner as Collins could not have had Robin testify due to the inculpatory information she had regarding his whereabouts at the time of the crime. The Court finds that there was no other evidence presented that Petitioner was intoxicated or under the influence of methamphetamine the day before the crimes were committed. Absent other evidence in support or proof by Petitioner, the Court will not assume that Petitioner was intoxicated when the crimes were committed. Rather, the evidence shows that it was Petitioner who remained calm when

the gun misfired as Nabors was trying to kill Robin Cady. It was Petitioner who encouraged Nabors to remain calm as there were no cars coming, to get a shell chambered and shoot Cady. Such behavior at the time of the crime does not demonstrate intoxication and, in fact, undercuts an assertion of intoxication. See Williams, 41 F. Supp.2d at 1058.

At the evidentiary hearing, Petitioner asked Dr. Shaw to speculate about his condition if he had injected himself with 3 or 4 one-gram doses of methamphetamine the day before the crimes occurred. Dr. Shaw speculated that such a level of usage would have kept Petitioner intoxicated and would have affected not only his judgment, but made him more impulsive and more aggressive. (R.T. 10/3/01, at 45.) Based on this speculative level of usage, Dr. Shaw testified that it was very possible that Petitioner was experiencing a methamphetamine induced paranoia or psychosis at the time of the crime. (R.T. 10/3/01, at 52.)

Respondents cross-examined and thoroughly impeached Dr. Shaw's conclusion that Petitioner was in a psychosis when he committed the murders. (R.T. 10/3/01, at 117-36.) Respondents established the criteria required before an expert may reach a diagnosis of substance abuse psychosis. Such criteria includes prominent hallucinations or delusions. (R.T. 10/3/01, at 115-16.) Dr. Shaw admitted that he only minimally considered the facts of the crime before reaching his conclusion. After considering the facts of the crime, Dr. Shaw admitted such facts do not necessarily establish that Petitioner had prominent

hallucinations or delusions. (Id. at 117-141.) Rather, the facts of the crime show that Petitioner was involved in deliberative acts, planning, conspiring, avoiding detection, awareness of wrongdoing, and that he was oriented to time, place and reality. (See id.)

The Court gives no weight to Dr. Shaw's speculative conclusion which was based upon hypothetical drug usage at the time of the crimes that was not established. Absent factual support for such alleged drug usage, Dr. Shaw's conclusion that Petitioner was suffering hallucinations or delusions at the time of the crime or his conclusion that Petitioner was in a methamphetamine psychosis when he committed the crimes is entirely not credible and wholly speculative. See Williams, 41 F. Supp.2d at 1058.

The Court finds further support for its conclusion that Dr. Shaw's opinion is entitled to no weight in United States ex rel. Kokoraleis v. Director, Illinois Dept. of Corrections, 963 F.Supp. 1473 (N.D. Ill. 1997). In a capital habeas action, the Kokoraleis court faced a similar evidentiary issue. At trial and sentencing, defendant had maintained his innocence of the murders, claiming that his confessions were untrue and were coerced by police officers. Unaware of any psychological history, trial counsel did not have petitioner tested by a mental health expert. Habeas counsel had petitioner psychologically tested and petitioner was diagnosed with a personality disorder. The mental health expert acknowledged that his diagnosis was based on assumed facts, where he assumed that petitioner had committed the murders to

which he confessed and that a co-defendant had some emotional and psychological influence over the petitioner. The Kokoraleis court concluded that "ordinarily an opinion of this sort by a lay witness is of no value without some supporting fact basis." 963 F. Supp. at 1485. Regarding the expert's conclusion, the court found a failure of proof regarding what the expert had concluded as there had been no showing how the factual assumptions underlying the opinion would have been proven at sentencing. Id. at 1485-86.

Respondents' expert in addiction, Dr. Daryl Matthews, evaluated the facts surrounding the crimes and concluded that they demonstrate that Petitioner was not in a substance abuse psychosis. (R.T. 11/6/01, at 88-112.) The Court finds Dr. Matthews credible on this point. Dr. Matthews's testimony was credible because he utilized the facts of the case to support his opinion and tied his opinion to the facts of the case. (Id.; see Williams, 41 F. Supp.2d at 1058.) Therefore, the Court concludes that Petitioner was not in a drug induced psychosis when he committed the murders.

2. History of Drug Abuse

Regarding past substance abuse, Petitioner self-reported to Dr. Shaw that at the age of 10 he began drinking alcohol and at the age of 12 began using drugs, including marijuana, amphetamines, LSD, and Seconal.[48] (Exhibit 25.) At the age of 14, Petitioner

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[48] Petitioner's CDOC records substantiate his claim that he began abusing drugs at a early age. (Exhibit 9, 71.)

reports that he first started taking drugs intravenously, including injections of heroin, methamphetamine and cocaine. Methamphetamine became his drug of choice. Petitioner asserted that as his tolerance of methamphetamine grew, he had to inject a larger amount to obtain the experience he desired and was injecting as much as 4 grams a day.[49] (Exhibit 25, at 2.) The Court finds Petitioner's report of injecting 4 grams a day both unsubstantiated and unreliable.

Based on Petitioner's self-report of drug abuse since the age of 12, Dr. Shaw testified that Petitioner is a methamphetamine addict with dual diagnosis. (R.T. 10/3/01, at 37-42.) Dual diagnosis describes the existence of an underlying major mental illness in addition to a diagnosed drug addiction. Dr. Shaw testified that Petitioner suffers from a major depressive illness and/or PTSD in addition to being a methamphetamine addict. (Id. at 39.) In support of his PTSD diagnosis, Dr. Shaw cites Petitioner's traumatic childhood. (Id.)

Dr. Becker also testified about whether Petitioner is properly diagnosed as suffering from PTSD or a major depressive disorder. Dr. Becker indicated only a possibility that Petitioner was properly diagnosed with PTSD. (R.T. 10/4/01, at 161.)

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[49] Petitioner called Dawn Day to testify to corroborate his past drug abuse. Petitioner, however, did not prove that Dawn Day was an available witness who was willing to testify at sentencing. Consequently, Petitioner cannot utilize her testimony to establish prejudice. See supra page 19.

Dr. Becker did not support Dr. Shaw's conclusion that Petitioner suffers from a major depressive illness. Dr. Becker indicated that Petitioner is mildly depressed.[50] (R.T. 10/4/01, at 86.)

Both Drs. Martell and Scialli disagreed with Dr. Shaw's conclusions. These doctors concluded that there is no objective evidence to conclude that Petitioner meets the diagnostic criteria for PTSD or a major depressive disorder. (R.T. 11/6/01, at 36-40 (Martell); R.T. 11/7/01, at 73 (Scialli); Exhibits 205, 211.) Based on this evidence, this Court has already found that Petitioner does not meet the diagnostic criteria for PTSD, a major depressive disorder or bipolar disorder. See supra page 70.

The Court concludes that Petitioner is a self-reported methamphetamine addict, however, he does not suffer from a dual diagnosis because he has no underlying major mental illness.

Discussion

1. Condition at Time of the Crimes

Petitioner did not inject methamphetamine the

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[50] Dr Becker testified that at one time in Petitioner's life, he may have suffered from a major depressive illness. (R.T. 10/4/01, at 116.) Dr. Becker believed that "severe depression" had been mentioned in his medical records. The records available do not buttress Dr. Becker's recollection. The Court finds that there are no records indicating that Petitioner was ever diagnosed with a major depressive disorder. (See Exhibit 9.)

morning of April 11, 1984, before the crimes were committed in the early morning hours of April 12, 1984. Such usage was not brought out at sentencing. Petitioner was not prejudiced by this omission because the source of this information, Robin Correll, also had extremely prejudicial inculpatory information concerning Petitioner and his whereabouts at the time of the crime.

Petitioner offered the opinion of Dr. Sullivan and Dr. Shaw regarding his condition at the time of the crime. The Court gives no weight, and thus no prejudicial effect to Dr. Sullivan's opinion regarding the possible effects of methamphetamine use upon Petitioner as his opinion was based on unsubstantiated and unreliable assumptions. Moreover, the Court has already noted that even with these unreliable factual assumptions, Dr. Sullivan did not make a specific diagnosis whether methamphetamine abuse affected Petitioner in 1984.

Next, Petitioner offered the opinion of Dr. Shaw who opined that Petitioner my have been in a psychosis when he committed the crimes. The Court concludes that Dr. Shaw's opinion is not entitled to weight, or any prejudicial effect, both due to the lack of recognized psychotic symptoms in Petitioner when the crimes were committed and due to the lack of any factual support that Petitioner abused methamphetamine the day before the murders.

Previously, the Court outlined the standards Arizona uses to evaluate intoxication evidence, regardless of whether the intoxication evidence is

alcohol or substance abuse. See supra page 43. At the evidentiary hearing, Petitioner did not establish that he was so substantially impaired that he did not appreciate the wrongfulness of his conduct; neither did Petitioner establish that his capacity to conform his conduct to the requirements of law was significantly impaired. Therefore, Petitioner did not meet required standards for statutory mitigation. See A.R.S. § 13-703(G) (1). Even if he had met either of those requirements, Petitioner did not establish that his condition at the time of the crimes was a contributing cause (i.e., a substantial factor) in causing the murders. See, e.g., Doss, 116 Ariz. at 163, 568 P.2d at 1061.

However, if a defendant's impairment does not rise to the level of a statutory mitigating circumstance, a trial judge considers whether such impairment, when viewed in light of a history of alcohol or drug abuse, constitutes a non-statutory mitigating circumstance. See Gallegos, 178 Ariz. at 17, 870 P.2d at 1114. At the hearing, in addition to the presentence report, Petitioner established a history of substance abuse and abuse of methamphetamine outside of prison. For the 229 days Petitioner was not incarcerated between October 1975 and March 1984, the Court finds that Petitioner did abuse methamphetamine in some unknown amount but did not seek any type of treatment or help for his substance abuse problem.

The Court must evaluate whether any independent mitigating weight should attach to Petitioner's impairment at the time of the crimes, in light of his history of drug abuse, and how this affects

the prejudice analysis. Although Petitioner, through Snellings' report to the police, established that he was under the influence of drugs and/or alcohol when he committed the crimes, he was not so intoxicated that he could not appreciate the wrongfulness of his conduct or conform his behavior to the requirements of law. The Court concludes that even when Petitioner's impairment at the time of the crimes is evaluated in light of his history of substance abuse, such impairment evidence is entitled to only de minimis weight, and has no prejudicial effect upon sentencing. Petitioner was aware that the crimes were wrong, and he could have conformed his behavior to the requirements of law. Petitioner did not prove that his impairment had anything to do with why he committed the murders. Rather, the evidence shows that he was fully aware of his actions when he conspired and planned a robbery and undertook many measures to avoid detection. Petitioner coldly and calmly participated in the murders, trying to ensure that there would be no witnesses left to the robbery.

2. History of Substance Abuse as Independent Non-Statutory Mitigation

The presentence report discussed, in part, Petitioner's history of drug abuse. (Exhibit 53.) Previously, the Court outlined the standards utilized to evaluate a history of substance abuse. See supra page 44. At the hearing, Petitioner provided additional history of his substance abuse and addiction to methamphetamine. Petitioner offered the opinion of Dr. Sullivan and Dr. Shaw regarding his history of drug abuse and his addiction to methamphetamine.

The Court gives no weight, and thus no prejudicial effect, to Dr. Sullivan's opinion regarding the possible effects of Petitioner's past methamphetamine use as he was provided unreliable background information regarding Petitioner's history of drug abuse. The Court also gives no weight, or any prejudicial effect, to Dr. Shaw's conclusion that Petitioner is suffering from a dual diagnosis, from his addiction to methamphetamine and a major depressive disorder. The evidentiary record and expert testimony do not substantiate or support this diagnosis. See supra page 87-89. The record and expert testimony do support Petitioner's addiction to methamphetamine and a history of substance abuse. Such history and addiction was not entirely disclosed at sentencing, although it was presented, in part, in the presentence report. (Exhibit 53.)

Even though Petitioner provided additional evidence regarding this history of substance abuse and addiction, he cannot assume that a fact finder making a prejudice determination will be overly sympathetic to past drug and alcohol abuse. See Mayfield, 270 F.3d at 931 n.17 (stating that juries at the penalty phase are unlikely to favor defenses based on abuse of dangerous drugs in evaluating a defendant's culpability for violent behavior). Given the circumstances of the crime and execution style murders, Petitioner was not prejudiced by Collins not presenting such evidence. In addition, Petitioner never sought treatment or help for his substance abuse problem. This further reduces any weight to which his substance abuse history may be entitled in assessing prejudice. See generally Bernard Smith, 140 F.3d at 1271; Gallegos, 185 Ariz. 340, 345,

916 P.2d 1056, 1061 (1996). In fact, when penal authorities tried to provide Petitioner assistance for his problems, he refused to cooperate and escaped from custody.

In addition, evidence of Petitioner's drug abuse history is somewhat cumulative because the presentence report indicated some of Petitioner's drug history. See Babbitt v. Calderon, 151 F.3d 1170, 1175 (9th Cir. 1998) (no prejudice where counsel failed to present cumulative mitigating evidence). For all of these reasons, Petitioner was not prejudiced by the lack of presentation of additional evidence of his history of substance abuse and addiction to methamphetamine.

D. Dysfunctional Family History

The Court found that Collins' investigation of Petitioner's family background was not deficient. See supra at page 53 to 56. However, assuming arguendo that Collins' performance at sentencing was deficient, the Court considers whether such performance prejudiced Petitioner at sentencing. At sentencing, the presentence report described Petitioner's social history, his family background, his education, his employment history and marital status, a history of his health and psychological problems, his problems with substance abuse and his criminal history, both juvenile and adult. During the sentencing proceeding, Collins reiterated that fact that Petitioner had been abandoned by his family at the age of 14 and that he was under the influence of drugs and/or alcohol at the time of the crimes.

At the evidentiary hearing, Petitioner developed additional evidence of his dysfunctional family background. Both of Petitioner's sisters, Robin and Patti, testified about their upbringing. Robin testified that her father physically molested her on a repeated and continuous basis. She stated that her father beat her when he found out that she had disclosed the molestation to her mother. Robin also testified that Petitioner sexually molested her on a continual basis. (R.T. 6/6/01, at 165-66.) Patti testified that her father and Danny Correll sexually molested her on a continual basis and that, subsequently, her father was arrested and convicted of child molestation. (R.T. 6/6/01, at 169.)

Petitioner's mental health expert, Dr. Becker, testified that Petitioner's criminal behavior might be attributable to a disadvantaged background. Dr. Becker supported this belief with the following allegations: Petitioner grew up in a home where the father engaged in incest with his daughters; Petitioner's parents were physically and emotionally abusive toward their children; Petitioner's parents were negligent in the handling of his head injury when he was 7; Petitioner running away from home; Petitioner's use of drugs at a very young age; and Petitioner being sentenced to juvenile institutions. (R.T. 10/4/01, at 115-16.)

The Court must evaluate the underlying allegations that support Dr. Becker's belief. It was undisputed that Petitioner's father did engage in incest with both of his daughters and that Petitioner was a

covert witness to incest with Robin; it was also undisputed that Petitioner sexually molested his sister Robin on a regular basis.

Petitioner self-reported suffering physical abuse from both of his parents. (Exhibits 53; 71; R.T. 6/8/01, at 43.) However, in 1978, Petitioner also reported to CDOC that he had positive feelings toward his father; this report was 6 years before the murders were committed. (Exhibit 71.) This admission by Petitioner supports the conclusion that any possible childhood abuse suffered did not have any effect upon him when he committed the murders in 1984.[51] Cf. Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (psychologist opined that at the time of the shooting the 16 year-old capital murder defendant was pulling the trigger on his abusive stepfather, a police officer, not the police officer actually murdered).

Petitioner did suffer a head injury at age 7. See discussion supra at page 74. Regarding this head injury, the Court determines that Petitioner's parents were not negligent in the manner they provided him treatment. (See R.T. 10/4/01, at 140-44.) They acted reasonably in caring for Petitioner, which included two visits to their family doctor, one emergency room visit and a follow-up visit for additional specialized testing. (Id.) The bare fact of having a head injury when he was growing up does not mean that Petitioner was subject to a disadvantaged family background.

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[51] Moreover, Petitioner went to his father's house in Las Vegas after the murders.

Next, Dr. Becker considered Petitioner's running away from home and his use of drugs at a tender age as self-medicating his problems with his dysfunctional family. However, part of Petitioner's unhappy childhood, incest with his sister, is the result of his own conduct, and any use of illicit drugs to medicate guilt for this behavior is not attributable to a dysfunctional family background. Moreover, when Petitioner began experimenting with drugs, his parents did not neglect such misbehavior but attempted to correct the misbehavior.

Finally, when Petitioner was arrested as a juvenile, his parents paid for long-term psychological counseling and participated in the treatment program along with Petitioner. This demonstrates a level of commitment to and involvement with Petitioner. Subsequently, Petitioner engaged in more criminal activity and was sentenced to a juvenile institution.

In summary, there is some underlying factual support for Dr. Becker's belief, given the physical or emotional abuse which Petitioner endured and the running away from home to escape abuse. However, as the Court has already identified, most of the underlying facts utilized by Dr. Becker are not entirely accurate or reliable. Further, the criminal act took place 10 years after Petitioner had ceased living in the family home. The Court concludes that the facts in support, the physical and emotional abuse, the living in an incestuous family, and the running away from home, do not support Dr. Becker's opinion that Petitioner's criminal behavior 10 years after leaving the family home might be attributable to a

dysfunctional family history.

Discussion

The Court has summarized the legal standards used to evaluate evidence of a difficult family background. See supra page 53. A dysfunctional family background is not necessarily entitled to significant mitigating weight. State v. Towery, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996). A dysfunctional family background may be entitled to more significant weight when there is a causal connection with the defendant's offense related conduct. Id. An abusive family background is only given significant weight when the abuse affected the defendant's behavior at the time of the crime. State v. Mann, 188 Ariz. 220, 231, 934 P.2d 784, 795 (1997). At issue is whether Petitioner was prejudiced by not having an expert testify at sentencing about his dysfunctional family whether his subsequent criminal activity is directly attributable to a difficult family history. See Eddings, 455 U.S. at 114 (dysfunctional family history is relevant mitigation evidence where a 16-year old ran away from home and murdered a police officer).

The Court concludes that Dr. Becker's opinion about whether Petitioner's criminal activity might be attributable to his dysfunctional family must be rejected as inaccurate and unreliable. Furthermore, if any such testimony had been presented at sentencing, it would have produced a doubled-edged dilemma. Her testimony about Petitioner living in an incest-ridden house would have opened the door to extremely

damaging rebuttal testimony that Petitioner regularly participated in incest by sexually molesting his sister Robin. Based on such damaging rebuttal information, Petitioner was not prejudiced by the lack of expert testimony at his sentencing on his dysfunctional family history. See Jones, 56 F.3d at 886 (introducing a psychiatric examination conducted in conjunction with a prior incest conviction would have opened the door to a host of unpleasant facts for the factfinder to consider); see also Karis v. Calderon, 283 F.3d 1117, 1136 (9th Cir. 2002) (no prejudice in not calling an expert witness to testify about childhood abuse when such testimony would open the door to the presentation of damaging evidence by the expert); Williams, 41 F.Supp.2d at 1051 (failing to call mental health expert to testify was not unreasonable when the testimony of the mental health expert would have opened the door to damaging rebuttal evidence from the prosecution).

At the hearing, Petitioner did not demonstrate or prove how such dysfunctional family information could have been presented at sentencing without the risk of the damaging rebuttal information. Absent Petitioner demonstrating a witness was willing and available to present such testimony at sentencing without opening the door to damaging rebuttal information, Petitioner was not prejudiced by its omission at sentencing.

E. Prejudice Summary

Establishing prejudice requires a showing that there is a reasonable probability that but for counsel's

unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. The Court must determine whether its confidence in the outcome of the sentencing proceeding has been undermined. Id.

Ineffective assistance of counsel at the sentencing phase of a capital case is not an issue where the Court encounters a paucity of legal authority. Due to the importance of effective counsel and the severity of the penalty at issue, courts have frequently addressed this claim. Since the Court must review a large number of cases in its analysis, and since the facts of each case regarding aggravation/mitigation are somewhat particular, it is efficient to group types of cases rather than discuss each case individually.

Because this is a post-evidentiary hearing ruling, cases remanding the issue of IAC at the sentencing phase for an evidentiary hearing are not dispositive. See Turner v. Calderon, 281 F.3d 851 (9th Cir. 2002); Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001); Smith (Robert) v. Stewart, 241 F.3d 1191 (9th Cir. 2001); Wallace v. Stewart, 184 F.3d 1112 (9th Cir. 1999); Caro v. Calderon, 165 F.3d 1223 (9th Cir. 1999).

This case is not controlled by cases finding prejudice where petitioner's experts had been called to testify in mitigation but such experts were not provided with pertinent available background information by petitioner's counsel. See Smith (J.C.) v. Stewart, 189 F.3d 1004 (9th Cir. 1999), and Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997). In those cases,

when missing background information was provided to the experts, they indicated that their mitigation presentation would have been more substantial had they been supplied with the additional information. Such is not an issue in this case.

The Ninth Circuit has repeatedly held that where there is evidence of significant mitigation that was not presented at the presentence hearing and there is a lack of rebuttal to such mitigation, prejudice is found to exist.[52] See Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003); Karis, 283 F.3d 1117 (9th Cir. 2002); Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001); Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001); Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000); Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995); Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989); and Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988).

Similarly, the Ninth Circuit has found prejudice where the mitigation evidence was not quite substantial, where no rebuttal evidence was presented, and there was only one aggravating circumstance supporting the death sentence. See Silva v. Calderon, 279 F.3d 825 (9th Cir. 2002); Smith (Bernard) v. Stewart, 140 F.3d 1263 (9th Cir. 1998); and Clabourne

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[52] See also Williams v. Taylor, 529 U.S. 362 (2000) (deficient performance and prejudice when defendant's attorneys failed to investigate and present substantial mitigating evidence regarding family background, borderline mental retardation and exemplary behavior in prison during the penalty phase of his capital murder trial.)

v. Lewis, 64 F.3d 1373 (9th Cir. 1995).

In contrast, the Ninth Circuit has clarified that where the aggravating circumstances are overwhelming, substantial mitigation is needed to establish prejudice. Gerlaugh, 129 F.3d at 1042-43; Bonin, 59 F.3d at 836; Campbell, 829 F.2d at 1464; accord In re Visciotti, 926 P.2d 987, 1005 (Cal. 1997) (concluding that the failure to present mitigation was not prejudicial where the aggravating factors were overwhelming; such aggravation included an execution style murder in the course of an armed robbery and defendant's prior criminal history of aggravated assault), habeas corpus granted in part, Visciotti v. Woodford, 288 F.3d 1097 (9th Cir.), rev'd, Woodford v. Viscoitti, 123 S. Ct. 357 (2002). Otherwise, the sentencing profile is barely altered and the sentencing verdict should not be disturbed. See Strickland, 466 U.S. at 699-700.

When evaluating the issue of prejudice, in Landrigan, 272 F.3d at 1228-29, the Ninth Circuit indicated that when a petitioner's past criminal history demonstrates exceptional depravity, such a fact must be included in the prejudice calculus. Likewise, in Campbell, 829 F.2d at 1464, the Ninth Circuit ruled that when available mitigation evidence opens the door to strong rebuttal evidence from the prosecution, such a circumstance generally leads a court to conclude that prejudice has not been established. Accord Williams v. Woodford, 306 F.3d 665 (9th Cir. 2002) (counsel made a reasonable decision not to introduce evidence at the penalty phase that was not especially helpful and would have opened the door to damaging rebuttal

evidence; moreover, introducing the alleged mitigating evidence would have removed any lingering doubt as to petitioner's guilt); see also Darden v. Wainwright, 477 U.S. 168, 186-87 (1986) (reasonable for counsel not to introduce any mitigating evidence and rely on plea for mercy from petitioner himself because any attempt to portray petitioner as a nonviolent man would have opened the door for the presentation of rebuttal evidence from the prosecution); Harris v. Cockrell, 313 F.3d 238, 244 (5th Cir. 2002) ("The jury could have viewed much of the evidence omitted by [Petitioner's] trial counsel as either mitigating or aggravating. . . . The failure to present such double-edged evidence is not prejudicial."); Cockrum v. Johnson, 119 F.3d 297, 304-05 (5th cir. 1997) (citing cases) (all denying IAC sentencing claims where alleged failures to investigate mitigating evidence did not prejudice the defendant because of the double-edged nature of the mitigation evidence which would have been available for presentation); Cf. Karis, 283 F.3d at 1136 (stating that it was not IAC for counsel not to introduce childhood abuse evidence through expert testimony because it would have opened the door to damaging rebuttal evidence); Ainsworth, 268 F.3d at 880 (Graber, J., dissenting) (stating that much of the evidence upon which the majority relied to find IAC prejudice at sentencing (antisocial personality disorder and history of drug abuse) presented a double-edged sword, opening the door to harmful rather than helpful inferences).

This case is controlled by Gerlaugh, Bonin, Landrigan, Campbell and Williams. The underlying facts are horrendous, the evidence of guilt is manifestly

substantiated and the aggravating penalty phase factors are overwhelming. Additionally, the facts demonstrate that Petitioner is an exceptionally depraved individual, exceptionally lacking in regard for others and appearing to have no morals. Consequently, substantial mitigation is necessary to establish prejudice.

The Court has conducted an extensive inquiry into the issue of mitigation. There is not only a lack of substantial mitigation, but the mitigation that was presented opened the door for the prosecution to come forward with strong damaging rebuttal information to counter its mitigating effect. Following Gerlaugh, Bonin, Landrigan, Campbell and Williams, the Court, pursuant to Strickland, concludes that the sentencing profile has barely been altered and thus, confidence in the outcome of the sentencing proceeding has not been undermined.

VI. CONCLUSION

As of the filing date of this order, no Ninth Circuit capital case have ever rejected an IAC claim at the penalty phase on the grounds of lack of Strickland prejudice after first finding that counsel provided deficient performance. Cf. Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003); Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002); Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002); Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001); Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001); Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000); Smith (J.C.) v. Stewart, 189 F.3d 1004 (9th Cir. 1999); Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998);

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Smith (Bernard) v. Stewart, 140 F.3d 1263 (9th Cir. 1998); Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995); Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995); Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994); Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989); and Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988). This statistic evidences an implicit recognition by the Ninth Circuit of the important role mitigation evidence plays in the penalty phase of a capital case. Indeed, mitigation evidence is even more significant in Arizona because the presence of an aggravating factor without mitigation evidence requires the court to impose the death penalty. See A.R.S. § 13-703(E). In analyzing Petitioner's IAC claim, the Court has endeavored to respect both the Ninth Circuit's and Arizona's recognition of the important role of mitigation evidence in the penalty phase of a capital case. In a case like the instant one, however, where the avenues of potential mitigation evidence are nothing more than double-edged swords, the Court simply is not persuaded that Collins' minor errors rendered the sentencing proceeding "fundamentally unfair or unreliable." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

Although the Court has attempted to recount the mitigation evidence presented at Petitioner's evidentiary hearing in detail, the bottom line is clear: a strategy of presenting Petitioner's emotional and mental problems, his condition at the time of the crime, or as a victim of an abusive and tragic upbringing, would have required the following

additional disclosures of facts, none of which are "mitigating:" (i) Petitioner's rape of a female psychotic patient while he was undergoing mental health treatment for his antisocial personality disorder and mild depression (supra at 66); (ii) Petitioner's numerous escapes from mental health treatment facilities and rejections of institutional efforts to provide him with mental health treatment (supra at 66); (iii) Petitioner's hostage taking and armed aggression against mental health workers in an escape attempt from a mental health treatment facility (supra at 66); (iv) the underlying factual basis of Petitioner's prior convictions for armed robbery (supra at 62); (v) the revelation that, shortly after the murders were committed, Petitioner and Nabors woke up Robin Correll and informed her that they needed a ride out-of-state right away (supra at 39); (vi) Petitioner's lack of effort to seek any type of treatment for his substance abuse problem (supra at 42); (vii) Petitioner's acts of regularly molesting his sister Robin (supra at 53); (viii) the conclusion of a social evaluation at age 18 that Petitioner was not a candidate for probation and was a danger to the community (supra at 68); (ix) additional information showing the efforts of Petitioner's parents to deal with his drug abuse problem and obtain psychological treatment for him following his armed threat against a teacher at school (supra at 64); (x) that Petitioner had no desire to work but only wished to enjoy himself (Exhibit 71); and (xi) Petitioner's statement that when he committed the 1978 armed robberies that it gave him a strong sense of power and excitement (supra at 62). All of this evidence would have been in the hands of Sidney Davis, a highly skilled prosecutor.

The critical error in Petitioner's argument that he is entitled to relief as a result of counsel's deficient performance at the penalty phase is that when all of the additional evidence is assembled, the double-edged nature of the additional evidence would have been presented in a graphic manner, just as it was to this Court. While it is highly improbable that the sentencer would spare Petitioner's life had they been informed of both the mitigating and non-mitigating aspects of the evidence detailed above, the prejudice prong of Strickland requires more than a possibility of a different result. Because the Court finds there is no reasonable probability of a different outcome, Petitioner is not entitled to relief on his IAC penalty phase claim.

The Court has conducted a nine (9) day evidentiary hearing regarding whether sentencing counsel's performance was deficient and, if so, whether Petitioner was prejudiced by such performance. Under the mandate established by Strickland and its progeny, the Court concludes that sentencing counsel's performance in only two sentencing phase aspects was deficient, but that Petitioner did not suffer prejudice. Mr. Collins' instincts, insights and analysis regarding the results of any investigation proved to be correct. However, his investigation into Petitioner's mental health did not go quite far enough to support his decisions. Yet, after all of the evidence that Collins could have obtained and presented has been reviewed, it is clear that the rebuttal and non-mitigating aspects of such evidence overwhelms any slight mitigation evidence. The evidence at the federal evidentiary

hearing proved what Collins was fearful of; the introduction of minimal mitigation evidence led to the establishment of overwhelming rebuttal evidence. Therefore, Petitioner is not entitled to habeas relief.

Accordingly,

IT IS HEREBY ORDERED denying with prejudice Petitioner's claim that he received ineffective assistance of counsel at sentencing.

IT IS FURTHER ORDERED concluding that Petitioner has met the standard for a certificate of appealability on this issue.

IT IS FURTHER ORDERED vacating the stay of execution previously entered by the Court. [File doc. no. 5].

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in accordance with this Order and send copies of this Order to all counsel of record, to Petitioner and to the Office of the Capital Case Staff Attorney.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Noel Dessaint, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 5 day of March, 2003.

s/_____

Stephen M. McNamee
Chief United States District Judge

114 (3)

No. 08-430

Supreme Court, U.S.
FILED
DEC 3 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Petitioner,

v.

MICHAEL EMERSON CORRELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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Capital Case

Question Presented for Review

In this pre-AEDPA capital appeal, the court of appeals remanded this case for an evidentiary hearing on Respondent Michael Emerson Correll's claim pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), that his trial counsel was ineffective at sentencing. Following the hearing, the district court denied Correll's claim. On appeal from that decision, the court concluded that Correll had received ineffective assistance of counsel at sentencing and that he was prejudiced as a result.

The court of appeals applied the clear-error standard in reviewing the decision of the district court. In conducting a thorough review of the evidence and record developed in the district court, the court of appeals provided a precise basis for its ruling and detailed those portions of the record where the district court made erroneous findings of fact.

1. Whether the court of appeals properly applied the standard set forth in *Strickland* in this fact-based case when it concluded that Correll's trial counsel provided ineffective assistance at sentencing by failing to investigate and present readily available evidence in mitigation of Correll's crime.

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Respondent, Michael Emerson Correll, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion by the Ninth Circuit. The opinion of the court of appeals is reported at *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008).

Statement of the Case

Correll respectfully directs this Court to, and adopts herein, the detailed recitation of the underlying facts and procedural history set forth in the opinion below.[1]

Correll notes that his federal habeas corpus petition was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and accordingly, the provisions of that act do not apply to him. Apx. A-34 to A-35. *See Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997).

Reasons for Denying the Petition

1. The court of appeals correctly applied the clear-error standard in its review of the district court's findings.

This case is about ineffective assistance of counsel in a capital sentencing proceeding. In 1998, the court of appeals remanded this case for an evidentiary hearing

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1. Petitioner filed as Appendix A to her petition for writ of certiorari a copy of the opinion below. Reference to the opinion below in this brief will be to Appendix A and will be noted as "Apx. A-__." The district court opinion was included as Appendix B and will be noted as "Apx. B-__." Petitioner did not append the state supreme court's direct-review opinion to her petition.

on that specific question, *see Correll v. Stewart*, 137 F.3d 1404, 1420 (9th Cir. 1998), and the district court's conclusion that Correll was not entitled to relief was the sole issue before the court of appeals below. *See* Apx. A-34. After the remand in this pre-AEDPA, fact-driven capital case, the court of appeals reversed due to the erroneous conclusions of the district court, and found Correll's trial counsel failed to properly investigate and present readily available mitigation evidence during the capital sentencing proceedings, and further determined Correll was prejudiced by that failure.

Petitioner does not present a compelling reason for this Court to grant certiorari. Petitioner's question is not of national importance, does not cite to a circuit conflict, and does not demonstrate that the opinion below is in conflict with this Court's precedent. *See* Sup. Ct. R. 10. Petitioner is simply asking this Court to correct factual findings she perceives as erroneous. By arguing that the court of appeals failed to defer to the district court, Petitioner overlooks the likelihood that the court of appeals correctly applied the clear-error standard and reached a conclusion different from that of the district court. That is what happened in this case. In each instance where the court of appeals disagreed with the district court's finding of fact, it said so and explained in detail with citations to the record as to the reasons why the findings were clearly erroneous.

a. An appellate court will uphold a trial court's findings of fact unless those findings are "clearly erroneous." Fed. R. Civ. P. 52(a)(6). A "clearly erroneous" finding is one that "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). When an appellate court has conducted a thorough review of the evidence and concluded that the trial court's findings were clearly erroneous, the appellate court must provide a "precise basis" for that conclusion. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857 n.20 (1984) ("If the Court of Appeals disagreed with the District Court's factual findings, it should not have dismissed them without finding them clearly erroneous.").

Here, the court of appeals conducted its constitutionally mandated review of Correll's conviction and sentence, and did so with the proper regard for Rule 52(a)(6). The court reviewed the "entire evidence," *U.S. Gypsum Co.*, 333 U.S. at 395, and, as described below, detailed those portions of the record where the district court made clearly erroneous findings of fact. The use of evidence by the court of appeals in its review of the district court's findings of fact, and its discussion of "clear error," stands in contrast to the approach taken by the court of appeals in *Inwood Labs. See* 456 U.S. at 857 n.17 ("The Court of Appeals cited no evidence to support its conclusion . . . ."); *see also id.* at 853 (reversing after noting that court of appeals reached its ruling "[w]ithout expressly stating that the District Court's findings were clearly erroneous . . . .").

The court of appeals conducted a comprehensive review, "meticulously review[ing] the entire record and reach[ing] the conclusion that the District Court was in error." *Anderson v. City of Bessemer City*, 470 U.S. 564, 581 (1985) (Powell, J., concurring in judgment only); *see also* Apx. A-63 to A-68. And in its review, the court relied on "documents or objective evidence," *Anderson*, 470 U.S. at 575, to assist in the evaluation of the district court's findings. *See, e.g.*, Apx. A-37 to A-39 (relying on, *inter alia*, counsel's handwritten notes and testimony to reject as "clearly erroneous" the district court's finding that Correll's attorney maintained "regular contact with [Correll] prior to sentencing"); Apx. A-39 to A-42 (drawing on counsel's testimony during the mitigation hearing to reject as "clearly erroneous" the district court's implicit finding that counsel was unaware of certain mitigating evidence). In accordance with this Court's instructions on how to apply Rule 52(a)(6), the court of appeals concluded, based upon its consideration of the record, that the district court's findings were "clearly erroneous." The court of appeals correctly applied the standard articulated in Rule 52(a) and, therefore, certiorari should not be granted.

b. The court of appeals relied upon *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny in reaching its decision. Citing *Strickland*; *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Williams v. Taylor*, 529 U.S. 362 (2000), throughout its opinion, the court of appeals concluded Correll did not receive effective assistance of counsel at sentencing.

Specifically, the court of appeals concluded that trial counsel's mitigation investigation was "unreasonably limited" and his performance was "constitutionally deficient." Apx. A-44, A-45. The mitigation evidence that counsel did present—a short written response to a presentence report—was "constitutionally deficient," "anemic," and failed to defend against the State's aggravating evidence. Apx. A-46 to A-50. "[D]efense counsel put on no affirmative penalty defense whatsoever. He did not call a single witness to testify. He did not introduce any evidence." Apx. A-46. In this case, "there was a substantial amount of mitigating evidence that could have been presented, but was not." Apx. A-59. In view of the record developed in this case—"an unusual case in the capital context because it involved a defendant who had not killed any of the victims"—"there is a significant possibility that the introduction of *some* mitigating evidence could have spared Correll's life." Apx. A-68.

In *Strickland*, this Court established the standard for addressing claims of ineffective assistance of counsel at capital trials and for determining whether any such deficient performance was prejudicial to the defendant. This Court has repeatedly reviewed and reaffirmed the analytic process set forth in *Strickland*. *See Rompilla*, 545 U.S. at 393-94 (O'Connor, J., concurring) ("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*.") (citation omitted); *Wiggins*, 539 U.S. at 521-23 (reiterating that *Strickland* is the metric by which claims of ineffective assistance of counsel are

judged); *Williams*, 529 U.S. at 391-94 (discussing the *Strickland* analysis in detail). This was the analysis applied by the court of appeals.

c. Petitioner claims that the court below did not afford deference to the district court's factual findings. Pet. at 6-7. Petitioner's complaint is that the opinion by the court of appeals is not supported by, or is contrary to, or presents an entirely different perspective of, the facts than the district court's findings. Petitioner seems to say that an appellate court is confined to reviewing the four corners of the district court opinion, rather than the entire district court record. That is not the case, however, as the factual findings by the district court must be fairly supported by the record as a whole. *See U.S. Gypsum Co.*, 333 U.S. at 395. Here they were not.

i. The performance by Correll's trial counsel did not even approach the standard set by *Strickland* and its progeny for counsel in a capital sentencing proceeding. Petitioner takes issue with the specific language used by the court of appeals when it found that the district court erred in denying relief. These complaints have no merit.

The court of appeals agreed with the district court that trial counsel's failure to obtain Correll's psychiatric records constituted deficient performance. Apx. A-44. However, in reviewing other aspects of trial counsel's performance, the court of appeals determined that the district court was clearly erroneous in making its findings.

For instance, trial counsel did little to discuss potential mitigation evidence with Correll. The district court found that trial counsel maintained regular contact, meeting with Correll prior to sentencing. Apx. B-18. However, counsel's testimony and his handwritten notes demonstrate that counsel met with Correll at the most three times, and perhaps only once, and that counsel made minimal efforts to explain mitigation to Correll. Based on this record, the court of appeals "conclude[d] that the district court's factual finding on this issue was clearly erroneous and that the district court's legal conclusion was in error." Apx. A-38 to A-39.

The district court also excused trial counsel's failure to inquire as to Correll's social background, family abuse, mental impairments, physical health, and substance-abuse history because Correll "had not informed" his lawyer about these factors. Because of this failure, the district court continued, trial counsel was unaware of and could not have investigated these mitigating factors. Apx. A-39 to A-40. But when he testified at the evidentiary hearing, trial counsel "explicitly confirmed that he was aware of Correll's mental health disorders, psychiatric commitments, drug abuse history, brain injury, and family dysfunction." Apx. A-40. Based on this record, the court of appeals concluded that "trial counsel was aware of many if not all relevant mitigating factors" and the district court's findings were "clearly erroneous." Apx. A-42.

Armed with the knowledge of Correll's background, trial counsel nevertheless failed to ask witnesses he interviewed about this potential mitigation. The district

court concluded that the witnesses who counsel interviewed "were not able to provide relevant useful mitigation information."[2] Apx. B-19. However, trial counsel admitted he only interviewed witnesses for the guilt phase and not the sentencing phase, and that he did not conduct an investigation as to any of the mitigation evidence of which he was aware. Apx. A-42 to A-43. He expressly testified that he did not question "interviewees about Correll's drug abuse, head injury, psychiatric history, or family dysfunction. . . ." Apx. A-43. Instead, counsel asked witnesses to tell him things that the witnesses thought might help. Apx. A-43.

Finding the district court's conclusions clearly erroneous, the court of appeals determined counsel's failure did not result from the unavailability of mitigation, but from "counsel's complete failure to ask any relevant questions" of the witnesses. Apx. A-43. Trial counsel testified that he wanted to "show Correll as a 'good person' and one who had 'done good deeds.'" Apx. A-44. This, the court of appeals concluded, was unreasonable because it would not likely humanize Correll, as counsel was aware of evidence that "would portray Correll as a 'person whose moral sense was warped by abuse, drugs, [or] mental incapacity.'" Apx. A-45 (alteration in original). Even if this was counsel's strategy, his investigation was inadequate as counsel failed to contact witnesses who were available

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2. At least twenty-four of the witnesses were law-enforcement officials. Trial counsel "testified that he met only once with Correll's father, sister, and brother, 'around the kitchen table at the same time,' and probably spent only '[a] couple hours' with them." Apx. A-42 (alteration in original).

to testify on Correll's behalf. Apx. A-45. Based on all this, the court of appeals concluded counsel's failure to investigate for sentencing was constitutionally inadequate and fell "far short of any objective standard against which we might measure reasonable attorney performance under the Sixth Amendment." Apx. A-46.

The court of appeals also determined that "[a]s anemic as the defense counsel's investigation was, his presentation of mitigating evidence at the penalty phase was worse." Apx. A-46. The record showed that counsel "did not call a single witness to testify[] [and] [h]e did not introduce any evidence." Apx. A-46. This was a "critical error, certainly rising to the level of constitutionally deficient representation" because "[a]t the time of the penalty phase proceedings, Arizona law mandated the death penalty if the trial judge found any one of the enumerated aggravating factors and determined that there were no mitigating factors that were sufficiently substantial to call for leniency." Apx. A-48 to A-49 (citation omitted). Under Arizona law, "[o]ne of the enumerated aggravating circumstances is a previous violent felony, for which Correll unquestionably qualified." Apx. A-49.

ii. This Court has consistently held that trial counsel's failure to present readily available evidence of mitigation is sufficient to undermine confidence in the result of a sentencing proceeding, thereby rendering counsel's performance prejudicial. *Rompilla*, 545 U.S. at 390-91. A sentencing proceeding infected by constitutionally deficient investigation and presentation of mitigation establishes prejudice whenever the reviewing court cannot have "confidence in the

outcome" of such a proceeding. *Strickland*, 466 U.S. at 694. This Court has emphasized that the prejudice analysis does not depend on whether the outcome of the proceeding would have been different. "[T]he [outcome-determinative] standard is not quite appropriate." *Id.* Rather, Correll must show a "reasonable probability" that counsel's errors are of a magnitude "sufficient to undermine confidence in the outcome of the proceeding." *Id.* "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

In this case, counsel operated under a misconception of mitigation that was so fundamentally flawed as to approach hostility to the idea. For instance, at the evidentiary hearing, he referred to the sentencing hearing as "a dog and pony show" and "so much smoke." Apx. A-55. Trial counsel believed that the trial judge would not have been receptive to mitigation evidence that was "touchy-feelly [sic] fuzzy-headed kind of stuff." Apx. A-55 (alteration in original). When asked about Correll's brain injury, his history of drug addiction, and abuse suffered as a child, "counsel testified that he didn't think of the evidence as favorable evidence." Apx. A-55. The district court ignored this testimony.

Counsel failed to investigate and present evidence of Correll's brain injury,[3] alcohol and drug use both

3. The court of appeals determined that the district court erred when it concluded Correll presented insufficient evidence of organic brain damage. It was not the district court's role to (Cont'd)

before[4] and at the time of the murder,[5] psychiatric

(Cont'd)
"evaluate the evidence in order to reach a conclusive opinion as to Correll's brain injury. . . ." Instead, "[t]he district court should have decided only whether there existed a 'reasonable probability' that 'an objective fact-finder' in a state sentencing hearing would have concluded, based on the evidence presented, that Correll had a brain injury that impaired his judgment at the time of the crimes." Apx. A-60 n.6 (citation omitted).

4. There was significant evidence in the record from prison records, medical records, and witnesses to corroborate Correll's history of drug abuse. The district court, however, discounted Correll's substance-abuse history because it was based on self-reports. The court of appeals held this finding was clearly erroneous, because the district court ignored corroborating evidence in the record. Apx. A-63 n.7.

5. The district court relied on testimony from the trial that Correll did not appear to be intoxicated at the time of the crime. However, experts testified at the evidentiary hearing that "gross methamphetamine intoxication, unlike gross alcohol intoxication, is not necessarily apparent to outside observers." Apx. A-65. Based on Correll's habitual use of methamphetamine in an extremely high dosage, the experts concluded Correll was in a "methamphetamine blackout," explained as the user being "capable of performing complex tasks but would be incapable of understanding or remembering his behavior. One of the experts, a recovered methamphetamine addict, specifically confirmed the possibility that 'those observing a person in a methamphetamine blackout [wouldn't] know that the person is in a methamphetamine blackout.'" Apx. A-65 to A-66 (alteration in original). Again, the district court ignored this testimony.

(Cont'd)

impairments,[6] and commitments to institutions.[7] The court of appeals relied upon this Court's holding in *Wiggins* to conclude that the available evidence presented classic mitigation evidence and that there was a reasonable probability that an objective fact-finder would have reached a different conclusion. Apx. A-63 to A-64 (citing 539 U.S. at 534-38).

d. Because none of the evidence described above was properly presented to the court at sentencing, prejudice is established and confidence in the result is undermined. The court of appeals relied on this Court's well established opinions in *Strickland* and its progeny,

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(Cont'd)
This undermined the court's finding, and it was "clearly wrong to conclude that there was no available evidence that Correll was grossly intoxicated" on the night of the crime. Apx. A-66.

6. "Correll was committed to psychiatric institutions at least twice during his teen years and was described at age 16 as 'severely psychologically impaired.' He was treated with a tranquilizer/anti-psychotic drug while institutionalized, and he attempted suicide on two occasions." Apx. A-61 to A-62.

7. "Correll became a ward of the state at age 14 and spent his teenage years in various state institutions described as 'gladiator schools,' which were characterized as cruel and inhumane, even by those who worked there. He was placed in programs for low performing students, which were referenced as 'dummy shacks.'"

Apx. A-61.

as well as Sixth Amendment standards in reaching this result. And as discussed herein and at length in the opinion below, the findings are supported by both the facts and the law. Contrary to the protestations of Petitioner, the court of appeals did apply the clear-error standard in reviewing the factual findings of the district court, and it applied the standard properly. The fact that Petitioner disagrees with the opinion of the court of appeals should not compel this Court to grant certiorari.

2. The court of appeals conducted the appropriate prejudice-prong review as part of its *Strickland* analysis.

a. Petitioner suggests that the court of appeals eliminated the prejudice prong of *Strickland* and presumed prejudice. Pet. at 20. Petitioner quotes a section from the opinion below where the court notes that "there was a substantial amount of mitigating evidence available, which taken together, is sufficient to raise a presumption of prejudice under . . . *Wiggins*." Apx. A-63 (footnote and citation omitted). However, in the next sentence the court says "[b]ut we need not rest on presumption." Apx. A-63. The court then continued at length, much of which has been described above, and relying upon this Court's holding in *Wiggins*, concluded that the available evidence was classic mitigation, and "[i]n view of the record developed at the evidentiary hearing, [] conclude[d] that there is a reasonable probability that the outcome of Correll's sentencing would have been different had he received competent representation." Apx. A-68.

Again, Petitioner does not present a compelling reason for this Court to grant certiorari. Petitioner ignores the fact that the court of appeals performed the prejudice analysis required by *Strickland*. Apx. A-63-68. Petitioner seems to manufacture this question in order to ask the Court to review this fact-bound case. Here, the court of appeals correctly applied *Strickland* and decided the case on the merits. The opinion of the court of appeals does not present a question of national importance, does not create a circuit split, and is not in conflict with this Court's precedent. Sup. Ct. R.10.

b. This case is not the appropriate vehicle for determining, as Petitioner suggests, whether the Arizona courts correctly apply a causal-nexus test to evidence presented in mitigation of a capital crime, or whether the Arizona Supreme Court and the court of appeals are in conflict over application of a causal-nexus test. Pet. at 24-25. This case has a complex and convoluted procedural history and factual record, and is distinguishable from the state court cases cited by Petitioner. It is not a case in which certiorari should be granted.

Here, the causal-nexus issue arose for the first time in the federal district court during habeas corpus proceedings. The district court judge presided over an evidentiary hearing and improperly substituted his own judgment regarding the evidence for that of a reasonable juror in a state capital-sentencing proceeding, and also improperly limited his consideration of such evidence to that causally connected to the crime.

In finding no prejudice from counsel's deficiencies, the district court believed Correll was required to show a "causal nexus" between the proffered mitigation and the crime in order to support leniency. Apx. B- 75 n.47, B-80, B-94. This Court has made clear that this "causal nexus" requirement is unconstitutional, and flies in the face of years of death penalty jurisprudence. *See Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam); *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004). The court of appeals did not require Correll to show a "causal nexus" before finding the evidence mitigating, correcting the district court's error.

The Arizona Supreme Court has not been fairly presented with the causal-nexus issue in this case, which did not even arise in state court, and the state supreme court has not yet been given the opportunity to address *Tennard* and *Smith* in this matter. This is not a case in which a jury was prevented from considering evidence presented in a capital sentencing proceeding; it is thus entirely distinguishable from the Arizona Supreme Court's causal-nexus jurisprudence in that regard.

c. Petitioner complains that the court of appeals did not consider rebuttal evidence the State would have presented if trial counsel presented the mitigation evidence previously described herein. Pet. at 25-29. Again, Petitioner ignores the opinion by the court below.

The court of appeals determined "*all* the so-called 'damaging rebuttal evidence' could, in the hands of a competent attorney, have been used to support Correll's claims of dysfunctional upbringing and continuing mental disorder." Apx. A-67. The court noted "[t]hat

some of the defense witnesses at sentencing might have presented inculpatory testimony is not particularly significant, given that counsel had abandoned at sentencing any claims of actual innocence or misidentification." Apx. A-67 n.9. The court of appeals, in considering these facts, observed, "Indeed, all of the facts on which the dissent relies could be either dehumanizing or mitigating, depending on the context and history given for each cited fact." Apx. A-67 (footnote omitted). The court then concluded that "[i]n view of the record developed at the evidentiary hearing, . . . there is a reasonable probability that the outcome of Correll's sentencing would have been different had he received competent representation." Apx. A-68.

Additional support for the court's conclusion was the fact that the crime "involved a defendant who had not killed any of the victims. . . ." Apx. A-68. And, "[t]he failure to present a mitigation case was particularly indefensible under Arizona law that existed at the time, which required the imposition of the death penalty absent a case in mitigation." Apx. A-68. Considering all of these factors, the court of appeals determined, "there is a significant possibility that the introduction of *some* mitigating evidence could have spared Correll's life." Apx. A-68. Again, because of the fact-specific nature of the decision below, there is nothing about the relief granted that should compel this Court to grant review.

Conclusion

For these reasons, this Court should deny the petition for a writ of certiorari.

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